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No. 99 89

IN THE

Supreme Court of the United States

ROBERT BOGAN and SCOTT BOGAN,

Petitioners,

—v.—

AUSTIN E. HODGKINS, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John Doar
Counsel of Record
Michael S. Devorkin
Fran Obeid
DOAR DEVORKIN & RIECK
233 Broadway, 10th Floor
New York, New York 10279
(212) 619-3730

Attorneys for Petitioners

9888

QUESTIONS PRESENTED

1. Whether an agreement by independent contractors who are competing insurance agents is an illegal *per se* market allocation or price fixing under Section One of the Sherman Act, when the competitors agree not to bid on and not to contract for the personal services of each other's subagents in order to avoid "cutthroat economic competition," where there is no proof of a specific geographic market or other market division.

2. Whether, if the *per se* rule does not apply to such an agreement by competitors not to bid for the supply of personal services, the agreement has a sufficient, direct effect on competition in price and output to require application of the abbreviated quick look rule, and the defendant must prove with real evidence a procompetitive benefit which outweighs the anticompetitive harm.

LIST OF PARTIES

The parties to the proceeding in the Second Circuit Court of Appeals were the petitioners Robert and Scott Bogan and the respondent Austin E. Hodgkins, Jr. The parties before this Court are the same as in the Second Circuit. The Northwestern Mutual Life Insurance Company was a defendant in the District Court.

RULE 29.6 STATEMENT

This petition is not filed on behalf of a corporation, and Rule 29.6 does not apply.

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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

ROBERT BOGAN and SCOTT BOGAN,

Petitioners,

v.

AUSTIN E. HODGKINS, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners Robert and Scott Bogan respectfully request that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit, entered February 2, 1999, and the Order of the Court of Appeals, dated April 14, 1999, denying petitioners' petition for rehearing and suggestion of rehearing en banc, which affirmed a grant of summary judgment dismissing their Section 1 antitrust claims against Austin E. Hodgkins, Jr.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 166 F.3d 509 (2d Cir. 1999)(a1),[1] and the order denying rehearing is unreported. (a18). The decision of the district court is reported at 953 F.Supp. 532 (S.D.N.Y. 1997). (a19). The decision and order of the district court directing entry of a partial final judgment is unreported. (a61).

BASIS FOR JURISDICTION

On February 2, 1999, the court of appeals entered final judgment. (a1). On April 14, 1999, the court of appeals denied a timely petition for rehearing and a suggestion of rehearing en banc. (a18). This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).[2]

STATUTORY PROVISION INVOLVED

Section One of the Sherman Antitrust Act, 15 U.S.C. 1, provides in relevant part as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...."

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[1]The opinion is reprinted in the Appendix to the Petition, cited by the page number therein as "(a___)." Citations to other materials in the record below will be to "(A ___)" (referring to the joint appendix filed in the Second Circuit).

[2]The district court had jurisdiction over the antitrust and other claims pursuant to 15 U.S.C. §§ 15, 22; 28 U.S.C. §§ 1331, 1367. The court of appeals had jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF THE CASE

A. Independent General Agents Compete Horizontally.

Respondent Austin E. Hodgkins, Jr. is one of six general agents in the New York metropolitan area contracted to the Northwestern Mutual Life Insurance Company ("NML"). NML uses a pyramidal system of independent[3] contractors consisting nationally of approximately 100 general agents, 300 district agents, and 7000 sales agents. General agents contract with district agents. District agents contract with sales agents. General agents also contract directly with their own special agents. All three agent levels sell insurance directly to clients. (a4, A633 ¶ 5). Robert Bogan was a district agent contracted as an independent agent to the Hodgkins general agency. He also sold insurance. Scott Bogan was an independent sales agent contracted to Robert Bogan's district agency. (a21).

NML's contract, literature and sworn statements emphasize that the sales and district agents are "independent contractors" and not employees. (A1471, 1475 ¶ 4).[4] In the New York metropolitan area, for purposes of selling NML's products the general agencies share territory and compete against each other. (a5, A1557-59).[5]

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[3]NML emphasizes that agents are "independent contractors" and not employees. (A1471, 1475 ¶ 4).

[4]NML boasts that agents acquire an "exclusive franchise" and achieve independence, long-term security and financial reward. (A1488-93). NML emphasizes that an NML agent owns and manages his own business or franchise. "*You own a valuable franchise.*" (A1501).

[5]The district court found that NML owns no interest in the general or district agencies (A1935); the agencies are independent entities (A1939-41); and the general agencies are a "separate step" in the distribution of NML's product. (A1941).

The district court found that "General Agents have competing interests in recruiting the most productive agents from other General Agencies." (a38 n.12). Hodgkins and the other five general agents in the New York area aggressively compete against each other (1) to sell NML and other products and (2) to purchase the personal services of new district and sales agents. However, they agree *not to* bid for the personal services of each other's agents and *not to* permit transfers of existing agents.

NML compensates selling agents with commissions on initial and renewal premiums[6] and compensates general and district agents with override commissions on subagents' commissions. (a5, 21). Because of the override commissions, the total compensation of each general agent is directly and primarily tied to recruiting the best district agents and sales agents contracted directly to the general agent. Similarly, district agents seek to recruit the best sales agents. NML ranks agencies and agents to promote this competition. (A392 ¶ 3, 650–51, 1553–59).

A general agent pays to recruit his district and his own sales agents and has the discretion to train district agents[7] and to increase the prices paid to compensate his district agents and sales agents contracted directly to the general agency, by either providing an office and staff assistance or paying partial reimbursement for expenses either in specific amounts or a percentage of each agent's first year sales commissions. (A637). A district agent pays to recruit and train his own sales agents and has the same discretion to increase the prices paid to

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[6]As the agent remains with NML, his earnings increase largely because of renewal commissions. An agent is tied to NML, because if he leaves it is hard to take clients, and he loses renewals and bonus fees.

[7]Hodgkins did not pay anything to train Bogan's agents or to reimburse expenses.

compensate his agents by paying for expenses either in specific amounts or a percentage of the agent's first year commissions, usually 10-25%.

The district court found that general agents have the discretion, and may compete, to increase the prices paid to compensate subagents because they may vary the amount of training they provide and the nature and amount of expenses which they reimburse. (a37; *see* A634, 637, 650-51). The district court did not dispute that this discretion to increase the reimbursement of expenses would create wage competition for subordinate agents if they were permitted to transfer between agencies, but stated this would not affect such competition in the entire industry. (a47).

B. Hodgkins' Termination Of The Bogans

From 1982 through June 1990, Robert Bogan invested more than $1.5 million in the development and improvement of his agency, including reimbursing the expenses of his agents and paying all of the substantial costs of recruiting his sales agents. (a22). Hodgkins did not share these costs. Bogan's district agency became one of the most successful. (a22). From 1982 to 1989, his agency insurance volume increased tenfold and his national NML ranking grew from 240 to 4. (A676-77). Scott Bogan also became very successful. NML ranked Robert and Scott among the top 100 out of 7,000 sales agents. (a5-6, A677).

In 1990 Hodgkins and Robert Bogan began to have a dispute over Bogan's management of his independent agency. On May 29, 1990, Hodgkins terminated Robert Bogan as district agent without cause over a dispute about records. This resulted in the termination of Scott. On June 4, 1990, Hodgkins converted Robert Bogan's termination into a termination for cause because

of a dispute about records. (a7, 22-23). As discussed *infra*, as a result of an agreement among the six New York area general agents not to compete for services of each other's agents, the Bogans could not contract with another New York NML general agent, either before or after termination.

The district court found there was sufficient evidence to conclude that (i) Hodgkins sought to terminate Bogan to take over his agency without paying him any compensation, and Hodgkins' proffered reasons were pretextual, and (ii) there was a conspiracy that assisted Hodgkins in ending the Bogans' NML careers.

> . . . the facts as Bogan presents them paint a picture that he was highly successful and that he was drummed out by Hodgkins, who conditioned his further employment on allowing his Soliciting Agents to break their exclusive agency contracts with NML.
>
> * * *
>
> A reasonable jury might find that through the Metropolitan Policy, Hodgkins and NML used coercion aimed at getting Bogan to "go along" with Hodgkins' alleged policy of "don't ask, don't tell" with respect to the Soliciting Agents' violations of their exclusive agency contracts, that Bogan was not justly fired for cause, and that the Metropolitan Policy that facilitated his permanent termination could be considered a "boycott."

(a41 n.14.)

C. The General Agents Agreed Not To Compete To Purchase The Personal Services Of Agents From Other New York Agencies And Thus Not To Increase The Price Of Subagents' Compensation.

1. Formation of the Agreement

Over many years there evolved an agreement pursuant to which the six New York general agents agreed to restrict or eliminate horizontal competition among themselves for the services of each other's subagents and to thereby restrict the prices paid to compensate subagents. ("Agreement"). (a5-6, 23n.3, A1108). NML referred to this as the "New York Metropolitan Agreement." (A1549). As originally reduced to writing, the Agreement prohibited "transfer of agents between the General Agents." (A1559). There were similar agreements in other metropolitan areas, which NML conceded were "among the general agents." (A1023–24). NML's brochures distributed to all agents admitted that in the large metropolitan areas *the agencies* made agreements which "generally restrict Agents from transferring from one agency to another within that metropolitan area." (A1496, 1503). NML reaffirmed this was an agreement among the general agents. (A1577, 1581-82).[8]

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[8] "NML viewed its own potential participation in the Agreement as arbitrating disputes over transfers." (a6). In 1987, NML expressed its concern about the antitrust legality of these agreements (A1558), because they "did not permit transfer of any agent between general agencies and such "a 'no transfer' policy can be considered to be a boycott or refusal to deal." (A1574, 1589–90). Although NML stated that a no transfer rule for terminated agents "certainly could not be enforced by the Home Office," it also stated it would not interfere if the general agents so agreed. (A1574-75). NML feared this was a violation of the antitrust law. (a6, A1549). General agents expressed concern about putting the agreement in writing. (A1571).

Hodgkins agreed. He told Bogan's sales agents

> all of the Northwestern General Agents in the New York metropolitan area had met together and made an agreement that agents would not be allowed to transfer from one General Agency to another without the permission of their original General Agent.

(A788, *see* A656–58).

2. Hodgkins Enforced The Agreement Coercively Against The Bogans.

Both courts below found there was sufficient evidence that Hodgkins used the Agreement coercively against the Bogans. (a7-8, 41 n.14). While the court of appeals stated that the Bogans were able to find work at another carrier, this was an inferior job, and the district court found that they suffered very substantial losses.[9] (a54 and n.22; *see* A735, 1805–06).

In March 1990, in the middle of Hodgkins' dispute with Bogan and shortly before the terminations, Hodgkins wrote to set forth the current terms of the Agreement *not to compete*:

> 1. Current GA/DA must endorse such a move.
> 2. We will not speak with that person unless they can demonstrate that a GA/DA endorsement has been given.
> 3. In the case of agents that have "quit," they will not be eligible for recontract-

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[9]Existing clients represent approximately 50 percent of business. Upon termination, a terminated agent cannot retain the client and suffers a large loss. (A636–37, 728–29; *see* A1768–75).

> ing with a Metro NYC Agency for *24* months after the termination date.
>
> In summary, any Agent who is not happy with the current Agency environment for whatever reason would be best advised to resolve the problem where they are *or* leave the Metro NYC area *or* leave NML.
>
> At any rate, recontracting/transferring to another Metro/NYC office is *NOT* an option.

(A1586)(emphasis in original).[10]

During the course of terminating the Bogans, Hodgkins made it clear in several surreptitiously recorded conversations that it was *his* decision whether to bar the Bogans or to waive *his* rights under the Agreement. First, in writing he directed the other general agents not to deal with any Bogan agents. (A1730–31). Second, he warned Bogan's agents that he could veto anything they wanted to do: "You can either work for me or get out of the business." (a7, A784; *see* A719-20, 1440-42). When they asked if they could appeal to NML, Hodgkins replied: "This is my decision. I make these decisions . . . right now I've decided that everyone must contract with me." (A784). Hodgkins conceded in the district court that it was the general agents who have the right to prevent transfers. (A1109–13).

Bogan met with another general agent to discuss contracting as a district agent. Hodgkins warned he would not consent to

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[10]As a practical matter, a 24 month delay precluded transfer, because in that long period an agent would be without a contract and job and would lose first year and all renewal commissions.

such a contract. (A697, 1730–31). NML confirmed that it was up to Hodgkins to decide whether to "restrict [Bogan] from going with another Metropolitan General Agent." (A697, 1381). Bogan tested this by signing a written contract with another general agent as a sales agent and agreeing to contract with him as a district agent. (A719). Scott Bogan and one other sales agent signed a sales agent contract with that general agent, listing Robert Bogan as district agent. Subsequently, Hodgkins advised that these contracts were invalid, and that *he* would not permit them to contract with any NML agency other than Hodgkins. Sales agents had only two choices: recontract under the Hodgkins Agency or leave the business and never work for NML. (a7, A719–20, 754–55, 784–85). The other general agent explained that the only solution was to reconcile with Hodgkins: he must "be willing to let you go." (A720, 1440–42).

As a result of Hodgkins' veto, the Bogans could not recontract with another New York NML general agent. While each signed contracts with a different carrier after termination, their income dropped significantly because they essentially had to start all over again at lower compensation rates, and they lost most clients and significant renewal commissions. Robert Bogan also lost all of his district agency income. (A735). The district court accepted the fact of this injury. (a54 and n.22).

Hodgkins conceded that his motive was purely financial, i.e., to avoid "cut throat competition for agent services." Hodgkins' Br. on Appeal, 41 n. 15. If he did not bar a transfer, he also would lose $600,000 in premiums from competition from Bogan. (A1311).

D. History Of The Litigation

On April 22, 1991, the Bogans filed a first amended complaint. On February 6, 1997, the district court granted summary judgment for Hodgkins on the antitrust claims and declined to exercise supplemental jurisdiction on the state law claims. It found on disputed evidence that the conduct was not purely a horizontal agreement, applied a full blown rule of reason analysis, and concluded petitioners had not shown injury in the markets for the sale of insurance or hiring of agents. (a18). On September 12, 1997, at petitioners' request, the district court granted reconsideration. While it adhered to its decision on the antitrust claims, it suspended its decision as to jurisdiction on state law claims, and directed entry of a partial final judgment pursuant to Rule 54(b), Fed. R. Civ. P. (a59, 61).

On February 2, 1999, the court of appeals reversed the district court's improper finding of fact on summary judgment and held there was sufficient evidence from which a jury could conclude that the general agents entered a purely horizontal agreement not to bid for or to hire each other's agents without the consent of the existing general agent. (a9-10). However, the court of appeals held that the *per se* rule did not apply, because there was no geographic or market division, or group boycott, and this was more like an intrafirm agreement. (a13-15). The court of appeals also summarily held that since Hodgkins advanced procompetitive *allegations* for the restraint, the quick look abbreviated rule did not apply, and a full blown rule of reason analysis must apply, under which petitioners could not prevail. (a12 n.6). On April 14, 1999, the court of appeals denied the timely petition for rehearing and a suggestion of rehearing en banc. (a18).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' NARROW CONCEPTION OF MARKET ALLOCATION SUBJECT TO *PER SE* CONDEMNATION IS CONTRARY TO THIS COURT'S DECISIONS AND WOULD SERIOUSLY UNDERMINE PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT.

A. The Court Of Appeals Ignored The Proper Scope Of The *Per Se* Rule.

The *per se* rule applies to horizontal concerted refusals to bid or to split or to allocate suppliers without requiring proof of any specific geographical or market division. The court of appeals' legal analysis of horizontal agreements seriously departed from legal principles long established by this Court on which public and private antitrust enforcement have long relied. In concluding that because this was not a boycott or allocation of geographic territories the *per se* rule does not apply, the court of appeals failed to uphold that customer allocation is a category of naked restraint to which the *per se* rule has long applied. The court of appeals' reasons are in sharp and unexplained conflict with clearly established law. The error below is similar to the error and departure from antitrust enforcement policies which this Court, at the strong urging of the United States as *amicus curiae*, summarily reversed in *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990), *per curiam rev'g* 874 F.2d 1417 (11th Cir. 1989), *on reh'g*, 893 F.2d 293 (11th Cir. 1990). If this decision is not reversed, it will severely restrict the scope of the *per se* rule and pose a threat to proper public and private antitrust enforcement.

The district court found that, absent the existence of the Agreement at issue here, general agents and district agents normally compete against each other to hire the best district and sales agents. (a38 n.12). When a sales agent or district agent

is free to transfer to another agency, that agent would compete thereafter against his former managing agent to take away business and override commissions. Furthermore, it found that because general agents and district agents have the discretion to offer substantial additional compensation to their subagents over and above the commission paid by NML, either by providing services or paying a portion of the expenses of agents, they have the ability to vigorously compete for agents simply by varying the amount and nature of expense reimbursement and the eligibility requirements therefor. (a47). The Agreement precludes them from competing in offering better terms and conditions of hire, including paying higher prices to compensate for services. The restrictions apply both to current agents and to terminated agents.

First, the *per se* rule applies to concerted refusals to deal. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607–08, 610 (1972)(agreements to allocate territories to minimize competition; every business no matter how small must be free to compete); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959)("concerted refusals to deal with other traders [even one] have long been held to be in the forbidden [*per se*] category"). *Buyers' agreements* not to compete in purchasing goods or services are equally illegal.[11] No proof of an actual economic effect in any market is required. *See*

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[11]*Mandeville Farms v. Sugar Co.*, 334 U.S. 219, 236 (1948), *cited by, Mackey v. NFL*, 543 F.2d 606, 617-18 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *accord, Amer. Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir.), *cert. denied*, 510 U.S. 994 (1993); *Movie 1&2 v. United Artists Commun. Inc.*, 909 F.2d. 1245 (9th Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991).

Blackburn v. Sweeney, 53 F.3d 825 (7th Cir. 1995)(four member law firm). A concerted agreement to refuse to bid on a product, like price fixing, "impedes the ordinary give and take of the market place" and is anticompetitive on its face. *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 692-93 (1978). It is axiomatic that an agreement to allocate accounts is a "naked restraint," because for its own sake it directs competitors not to sell or here, not to hire certain experienced agents. *See Areeda, Antitrust Law*, ¶1501, p. 369 (1986).

Second, the *per se* rule applies to allocating a market and to splitting the same geographic market in order to eliminate some actual or potential competition. *Palmer v. BRG of Georgia, Inc., supra*, 498 U.S. at 49-50, *citing United States v. Topco Associates, Inc., supra*. This is exactly what the general agents did here. The general agents compete horizontally in two markets: (1) to acquire new agents and (2) to sell insurance. The subagents in each of the competing general agencies represent a portion of the potential market in which to acquire new subagents. The Agreement provided that those portions of the market consisting of the subagents in the other five agencies were off limits to the remaining competing general agent. The court of appeals' statements that proof of a geographic market was missing or that agents could transfer within New York[12] are irrelevant. Other than defining the product market of agent services which is restrained, no further showing of a market effect is required. The effect is presumed. As Justice Scalia has explained, splitting markets is illegal *per se*, because the

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[12]The Agreement permits transfers only if (i) the current managing agent consents, or (ii) the agent waits 18-24 months outside the NML system. In either case, the ability to transfer is illusory and results in a total restriction.

benefit of the prohibition "far exceeds the harm caused by overshooting slightly the precise congressional goal." *A. Scalia, The Rule of Law as a Law of Rules*, 56 U.Chi. L.Rev. 1175, 1183 (1989).

This application of the *per se* rule is a cornerstone of public and private antitrust enforcement. While the Department of Justice is not involved in this case, it was involved in *Palmer v. BRG of Georgia, Inc., supra*. There, a similar law enforcement issue was before this Court, because the court of appeals had wrongly held that there must be proof of dividing a relevant market in which there was competition. In *Palmer*, the Solicitor General's brief as *amicus curiae* urged summary reversal, because (1) a market division is a *per se* offense "without reference to whether a particular market was divided among actual competitors"; (2) the court of appeals "did radically misinterpret and misstate governing precedent"; and (3) if not corrected, the opinion would "be read to restrict very substantially the scope of the *per se* rule, [and] it poses a threat to the proper enforcement, both private and public, of the antitrust laws." Brief of the United States as Amicus Curiae in the Supreme Court in *Palmer v. BRG of Geogia, Inc.*, No. 89-1667, pp. 10, 15, 16.

These same concerns are compelling here, because the court of appeals' decision would bar much civil and criminal antitrust enforcement against customer allocation unless there is proof defendants have market power in specific markets. In paradigm allocation cases, there is not such proof. Whether an antitrust plaintiff must seek, introduce, and prevail on costly expert structural evidence in such cases is an important, continuing problem which warrants this Court's attention.

Although defendants normally face criminal conviction for allocating accounts, the court of appeals now has declared that it is legal. The court of appeals simply ignored hornbook

antitrust law that a competitors' agreement "to suppress all competition as to one phase of their business, i.e., old customers, should be *per se* illegal irrespective of their competition for new customers." *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 575 (2d Cir. 1961); *accord, United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990); *United States v. Goodman*, 850 F.2d 1473 (11th Cir. 1988); *United States v. Koppers*, 652 F.2d 290, 297 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978). Allocating suppliers or accounts is illegal without proof of effect on any specific market. *United States v. Brown*, 936 F.2d 1042 (9th Cir. 1991) (conviction for not bidding on each other's business); *accord, ES Development, Inc. v. RWM Enterprises, Inc.*, 939 F.2d 547, 555-57 (8th Cir. 1991), *cert. denied*, 502 U.S. 1097 (1992); *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884 (2d Cir. 1988); *United States v. Cooperative Theatres of Ohio, Inc.*, 845 F.2d 1367, 1372 (6th Cir. 1988); *United States v. Capitol Service, Inc.*, 756 F.2d 502 (7th Cir. 1985), *cert. denied*, 474 U.S. 945 (1985); *Service Merchandise Co. v. Boyd Corp.*, 722 F.2d 945 (1st Cir. 1983); *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980), *aff'd on reh'g*, 615 F.2d 575 (1st Cir.); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

It does not matter if the horizontal conspirators assign accounts by county, by even or odd addresses, or by even or odd social security numbers. Each is illegal *per se*, because competitors agree not to compete for a subset of potential customers or suppliers, and the process of competition is adversely affected. As Hodgkins warned: "You can either work for me or get out of the business." (A784). For a horizontal

agreement not to compete, the relevant market is merely "the market to which access is sought." *Fishman v. Estate of Wirtz*, 807 F.2d 520, 531 (7th Cir. 1986); *North American Soccer League v. Nat'l Football League*, 670 F.2d 1249, 1260 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982).

B. The Court Of Appeals' Reasons For Rejecting The *Per Se* Rule Have Long Been Rejected.

The court of appeals ignored these controlling authorities. Its reasons for rejecting the *per se* rule have either never been recognized or have long been rejected. (a13-15). To apply the *per se* rule, as the court of appeals should have, would not constitute an expansion of categories to which the *per se* rule applies. Rather, it would preserve longstanding precedent that deems market allocation or splitting a *per se* offense, which indeed is frequently the subject of criminal prosecution.

First, although the Agreement is a complete refusal to bid for suppliers/accounts, the court of appeals held it did not affect competition in the agent market as a whole, and that the *per se* rule did not apply because there was no geographic or market division or group boycott. (a13-15). This reasoning dramatically curtails the *per se* rule against market allocation. As this Court reaffirmed emphatically in *Palmer v. BRG of Georgia, Inc., supra*, the *per se* rule applies equally to agreements allocating entire markets between horizontal competitors *and* to agreements dividing customers or a market between horizontal competitors. In each case, the competitors divide up accounts and agree not to compete for the accounts. Here, since it is a restraint on the purchasers' side, it is an agreement not to buy from suppliers of personal services (subagents) assigned to the other competitors. As the district court found, the Bogans were highly successful agents and "a most attractive part of the market for labor." (a22, 41). Thus, the subagents are a portion of the supply market which is placed

off limits to all other general agents. The Agreement has an anticompetitive impact by eliminating actual or potential competition. Such agreements necessarily tend to affect price and output, because the competitors' refusal to bid means there can be no increase in the price paid to compensate the subagents and restricts growth in agencies.

A horizontal, concerted refusal to sell to a single account or bid on a single supplier is illegal *per se*, whether three or three thousand potential bidders conspire, or other buyers will still buy the services, but for lower compensation. An agreement among ten law firms in New York not to bid on each other's associates or on certain law students is just as illegal *per se* as an agreement among the top 100 or all law firms. In *Topco*, only a small percentage of the market was involved. *See Burke v. Ford*, 389 U.S. 320 (1967).

As *United States v. General Motors Corp.*, 384 U.S. 127 (1966), and *Topco* make clear, when it comes to horizontal collusion to deny businesses access to a product or to any market, the antitrust laws protect the process of competition and competitors, even without injury to the ultimate consumer or the entire market. The collusion here prohibits the Bogans from selling their services to agencies where those services would logically be the most desired and most valuable. It restricts the price paid to compensate them, because subagents cannot sell their services (output) to other NML agencies for better terms and conditions and cannot receive reimbursement for expenses, and agencies cannot compete for more agents (inputs). It necessarily *eliminates all price competition for these services. See Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 545 (10th Cir. 1995). Section 1 protects even single competitors from collusive action, even under the aegis of a common association. *Summit Health Ltd. v. Pinhas*, 500 U.S. 322, 337 (1991) (adequate supply of other professionals; even dissent recognized illegality because some consumers deprived of preferred supplier).

Accord, *Fuentes v. South Hills Cardiology*, 946 F.2d 196 (3d Cir. 1991).

Second, the court of appeals rejected a submarket of experienced agents on the grounds that the Bogans offered "no factual evidence regarding the demographics of the New York insurance market." (a16). This statement is doctrinally without merit. The court of appeals wrongly looked to merger or other cases to test for cross-elasticity of demand. (a16). However, in a horizontal collusion case, the courts should look to the market to which access is denied -- here the purchase of agent services. Each general agent eliminated all bidding for agent services -- as Hodgkins admitted -- to avoid "cutthroat competition," hardly a worthy justification.

Third, the court of appeals asserted that because the Bogans landed inferior jobs with another insurance carrier, this shows that the restraint "would only encourage other insurers' entry into a hypothetically distinct market for experienced NML agents, increasing competition." (a16 n.7). This assertion does not withstand scrutiny. A party injured by a horizontal restraint is not required to show that nobody will deal with him. Inferior job choices do not legitimize collusion.[13] *United States v. General Motors, supra*, (discounters could sell Fords or other models). In the sports cases which the court ignored, there were less favorable, alternatives.[14] Most important, this fact-driven conclusion was demonstrably untrue and improper on summary judgment. That the Bogans had to accept an inferior job does not prove in fact or theory that other carriers do or

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[13]The trial court found that the Bogans suffered injury because their income decreased dramatically. (a54 and n.22).

[14]*Radovich v. NFL*, 352 U.S. 445 (1957); *Mackey v. NFL*, *supra*, 543 F.2d at 617; *Kapp v. NFL*, 586 F.2d 644 (9th Cir. 1978), *cert denied*, 441 U.S. 907 (1979); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978).

will compete in the restrained market. Because (i) agents cannot transfer existing clients and revenue and (ii) experienced agents have a much higher compensation from existing renewals, (a54 n.22), which are significantly lost upon leaving NML, there are high barriers to other carriers competing to offer the same, much less greater, *total* compensation. The alleged competition from other carriers is no competition at all and of no concern to the NML agency, because switching to another carrier is so economically unattractive to an experienced agent. There simply was no evidence here of voluntary switching.

Fourth, an intrabrand element, (a14), does not protect a horizontal agreement. *United States v. General Motors Corp.*, *supra*, 384 U.S. at 142-43 (agreement by Chevy dealers not to deal with discounters was solely an intrabrand where discounters could buy Fords or Chryslers, but *per se* illegal); *see Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358 (3d Cir. 1992), *cert. denied*, 507 U.S. 912 (1993). Since the *per se* rule applies to an agreement between two NML agents and two Mass Mutual agents not to bid on insurance clients or on each other's subagents or not to buy computers from a particular vendor, that these independent, competing general agents are affiliated with NML is a distinction without a difference. The court of appeals' holding is a profound change in existing law and should be reversed.[15]

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[15]Under the court of appeals' radical holding, independent distributors of a product who otherwise compete in the purchase of supplies and labor are free to conspire not to compete, solely because they sell the same brand of products. Thus, all Chevrolet dealers would be free to (i) agree not to buy from a part dealer, (ii) agree not to compete in the hiring of sales managers, service managers or shop mechanics, (iii) set *the terms* and conditions of their employment, and (iv) fix wages -- all on the grounds that they sell a common product, Chevrolets.

II. If THE *PER SE* RULE DOES NOT APPLY, THE COURT OF APPEALS' REFUSAL TO APPLY THE QUICK LOOK RULE WHERE THE RESTRAINT DIRECTLY AFFECTS OUTPUT AND PRICE, MERELY BECAUSE OF UNSUBSTANTIATED PROCOMPETITIVE ALLEGATIONS, CONFLICTS WITH RECENT DECISIONS OF THIS COURT AND THE THIRD, SEVENTH AND TENTH CIRCUITS, AND EMASCULATES THE QUICK LOOK RULE.

If the Court concludes there was a valid reason to deny petitioners the protection against horizontal restraints provided by the *per se* rule, petitioners still were entitled to the benefits which *NCAA v. Board of Regents*, 468 U.S. 85 (1984) ("*NCAA*"), and *California Dental Assoc. v. F.T.C.*, No. 97-1625, __ U.S. __, 67 U.S.L.W. 4365 (May 24, 1999)(decided after the decision below) intended by the abbreviated "quick look" version of the rule of reason. Here, the general agents' Agreement is a refusal to bid for services and an agreement to divide suppliers. It is a textbook example of the kind of horizontal agreement, like the "ban on competitive bidding" present in *National Soc. of Prof. Eng. v. United States*, *supra*, 435 U.S. at 692, to which the "quick look" test applies. The court of appeals' decision conflicts with this Court's decisions in *California Dental*, *National Soc. of Prof. Eng. v. United States*, and *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986)("IFD"), and the correct application of the abbreviated rule by other circuits in *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir.), *cert. denied*, 119 S.Ct. 65 (1998); *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993); and *Chicago Pro. Sports Ltd. Partnership v. NBA*, 754 F. Supp. 1336 (N.D. Ill. 1991), *aff'd*, 961 F.2d 667, 674 (7th Cir.), *cert. denied*, 506 U.S. 954 (1992). At the very minimum it should be reversed and remanded for reconsideration in light of *California Dental*.

For the limited category of naked horizontal restraints to which the *per se* rule does not apply, the abbreviated rule is intended to be a middle ground between a full blown rule of reason analysis and the *per se* rule.[16] It places on defendants

> a heavy burden of establishing an affirmative defense which "competitively justifies" this apparent deviation from the operations of a free market.

NCAA, *supra*, 468 U.S. at 113. The court of appeals' decision misapplies the "quick look" analysis, makes it almost impossible to use, and seriously undermines proper antitrust law enforcement.

The court of appeals asserted that under "quick look," if a defendant has "shown a procompetitive justification for the conduct" then "'the court must proceed to weigh the overall reasonableness of the restraint using a full scale rule of reason analysis.'" *citing United States v. Brown University*, *supra*. (a12 n.6). The court of appeals held that Hodgkins made "sound *allegations* of procompetitive benefit. Thus, at best the inquiry returns to the rule of reason, under which the plaintiffs concede they lose." (a12 n.6). (emph. added).[17] Using this logic, the court of appeals found that Hodgkins' *allegations* required a full blow rule of reason analysis. This is not the law under *California Dental*, *NCAA* or any of the circuits which

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[16]"'No elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'" *NCAA*, *supra*, 468 U.S. at 109.

[17]The court of appeals correctly notes, (a12 n.6), that at oral argument, petitioners conceded they could not prove market effect under a full blown rule of reason analysis. However, they have never conceded that (1) a full blown rule of reason analysis is required here or under the "quick look" rule, or (2) that they would lose under a proper, abbreviated "quick look" analysis.

have applied the "quick look." If left unchanged the decision emasculates the abbreviated analysis.

First, the court was wrong in the procedures required by the abbreviated rule. Where the abbreviated rule is applicable, it does not impose a full blown analysis of market effect; indeed it is the antithesis of a full blown analysis. If properly applied, it imposes on the defendant the burden of proving (not alleging) the restraint has redeeming procompetitive benefits, and only then that the benefits outweigh the anticompetitive evils. The court relied on *Brown University, supra*, but it does not support its conclusion. Neither *Brown University* nor *California Dental* found as a matter of law (as the court did here) either that the abbreviated rule requires a full blown analysis once a procompetitive justification is advanced or that the mere assertion by the defendants of a benefit was enough. Rather, given unique social arguments about school scholarships, the Third Circuit decided that the full rule of reason, *not* the abbreviated rule should be used, and it remanded to reconsider the social benefits proven by *evidence*. Even *Brown* rejected the position adopted by the court of appeals. *Id.*, 5 F.3d at 673.[18]

California Dental, Prof. Eng'rs, NCAA, and *IFD* all require a flexible and highly abbreviated rule of reason analysis when there is an agreement not to compete in terms of price or output. Even if procompetitive benefits are proven, not merely alleged, the analysis does not revert back to full rule of reason but remains a balance of the immediate procompetitive benefits and the anticompetitive evils, coupled with a determination of

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[18]If an abbreviated rule of reason analysis always required a "showing of a detrimental effect on price, output, or quality, it would no longer be abbreviated." *Id.*

whether there are less restrictive means for achieving the benefits.[19]

Second, the court of appeals' decision effectively stands the abbreviated rule on its head in a most confusing fashion. Hodgkins should have been required not just to allege but at a trial to produce evidence to "connect the practice to consumers' benefits before the Court attempts an analysis of market power." *Chicago Pro. Sports Ltd. Partnership v. NBA, supra*, 961 F.2d at 674. The court's decision did not require Hodgkins to prove anything. It did what it faulted the district court for doing; it took upon itself to evaluate the evidence on this procompetitive balance and granted summary judgment. Hodgkins' only argument for competitive benefit was his claim that general agents should be able to invest in educating and training their agents without fear of losing agents to another general agent. However, in the end Hodgkins conceded on appeal that his motive was purely economic self-interest, typical of any anticompetitive agreement: the restraint was necessary "to insure that it [the distribution system] *is not torn apart by cutthroat competition for agent services.*" Hodgkins' Br. on Appeal, p. 41 n.15 (emphasis added).

The court misconstrued its role and wrongly accepted Hodgkins' post-hoc allegation as fact[20] with no proof the prac-

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[19]This is consistent with the enforcement and analytic policies of the Department of Justice as to horizontal restraints and the abbreviated rule of reason, which are set forth in the Address of Joel I. Klein, Acting Assistant Attorney General, Before The American Bar Association, November 7, 1996, www.usdoj.gov/atr/index.html.

[20]Hodgkins did not prove he ever invested *anything* in Bogan's agents, and *he did not*, much less prove that such an investment outweighed the negative restraint on all agents' ability to sell their services. He also did not prove the restraint is necessary to educate agents or that agents would be less well-trained if they joined another NML agency, which paid them more. There is no basis in the record for

tice is procompetitive and proconsumer. The elimination of competition merely saves the general agent the cost of paying additional expenses to make his agency more attractive to existing agents. There is no proof this actually improves intrabrand competition. This is only a saving money defense. Based on an assumption that competition itself is unreasonable, it is not valid. *NCAA, supra*, 468 U.S. at 117.[21] The only benefit for which Hodgkins is truly arguing is the desire of any monopsonist to be free from competition which will lower its profits by increasing its costs. This Court has never recognized this false benefit as justifying a restraint. In the end, Hodgkins' theory cuts exactly the other way. Free competition encourages all agencies to invest more in order to retain and attract the best agents. Consumers benefit when competition ensures that the best agents and agencies survive and grow.

The decision below is likely to seriously eviscerate the *per se* and abbreviated rules and encourage behavior which antitrust enforcement routinely considers illegal and not procompetitive. It also has important negative implications for the application of

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Hodgkins' *allegations* that he invested in Bogan's agents or that this advanced competition, much less for disregarding on summary judgment, Bogan's overwhelming contrary evidence that he paid the substantial costs of recruiting and training his sales agents.

[21]The idea that such restraints prevent "cherrypicking" the best agents is not proconsumer but a "free ride" argument. However, Hodgkins never proved that he invested anything in either Bogan brother, *Chicago Pro. Sports Ltd. Partnership v. NBA, supra*, 961 F.2d at 675–76, or that free-riding could not be addressed by some less restrictive means which should properly be addressed by the district court. *Sullivan v. NFL*, 34 F.3d 1091, 1103 (1st Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995). The agent could pay a flat fee to reimburse the former general agent for any proven *genuine* unrecouped training investments or for a limited time period the former general agent could retain management commissions, as Hodgkins once proposed. A1584.

the antitrust laws to protect the ability of individuals and small business persons to freely transfer from relationships with one business to relationships with another so that those businesses cannot agree among themselves to prohibit such movements.

CONCLUSION

For the foregoing reason, the petition for a writ of certiorari should be granted.

Dated: July 9, 1999

Respectfully submitted,

John Doar
Counsel of Record
Michael S. Devorkin
Fran Obeid
233 Broadway, 10th Floor
New York, New York 10279
(212) 619-3730

Attorneys for Petitioners
Robert Bogan and
Scott Bogan

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1997

(Argued: April 22, 1998 Decided: February 2, 1999)

Docket No. 97-9295

ROBERT BOGAN and SCOTT BOGAN,

Plaintiffs-Appellants,

—v.—

AUSTIN E. HODGKINS, JR.,

Defendant-Appellee,

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Defendant.

Before:

WALKER and CALABRESI, *Circuit Judges*, and RESTANI,* *Judge*.

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* Honorable Jane Restani, of the United States Court of International Trade, sitting by designation.

This is an appeal from a partial final judgment and order of the District Court for the Southern District of New York, Conner, *J.*, granting the motion of Robert and Scott Bogan ("the Bogans" or "plaintiffs") to reconsider its prior opinion, *Bogan v. Northwestern Mut. Life Ins. Co.*, 953 F. Supp. 532 (S.D.N.Y. 1997). The District Court vacated its judgment entered February 6, 1997, and (i) adhered to its prior decision granting partial summary judgment dismissing the Bogans' antitrust claims under Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1 (1994) [hereinafter the "Sherman Act"], against Austin E. Hodgkins, Jr.; (ii) vacated that part of its prior opinion, and reserved decision on the exercise of supplemental jurisdiction over various state law claims against Hodgkins and Northwestern Mutual Life Insurance Company ("NML") pending a decision on this appeal of the dismissal of the antitrust claims; (iii) denied in all other respects the Bogans' motion to vacate and amend the prior judgment; and (iv) directed entry of a partial final judgment, pursuant to Fed. R. Civ. P. 54(b).

The judgment is affirmed.

MICHAEL S. DEVORKIN (Doar Devorkin & Rieck, New York, NY), *for Plaintiffs-Appellants.*

TIMOTHY P. COON (Bleakley Platt & Schmidt, White Plains, NY), *for Defendant-Appellee.*

RESTANI, *Judge*:

This is an appeal from a partial final judgment and order of the District Court for the Southern District of New York, Conner, *J.*, granting the motion of Robert and Scott Bogan ("the Bogans" or "plaintiffs") to reconsider its prior opinion, *Bogan v. Northwestern Mut. Life Ins. Co.*, 953 F. Supp. 532 (S.D.N.Y. 1997). The District Court vacated its judgment entered February 6, 1997, and (i) adhered to its prior decision granting partial summary judgment dismissing the Bogans' antitrust claims under Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1 (1994) [hereinafter the "Sherman Act"], against Austin E. Hodgkins, Jr.; (ii) vacated that part of its prior opinion, and reserved decision on the exercise of supplemental jurisdiction over various state law claims against Hodgkins and Northwestern Mutual Life Insurance Company ("NML") pending a decision on this appeal of the dismissal of the antitrust claims; (iii) denied in all other respects the Bogans' motion to vacate and amend the prior judgment; and (iv) directed entry of a partial final judgment, pursuant to Fed. R. Civ. P. 54(b).

Plaintiff-appellants contend that the District Court erred in granting partial summary judgment dismissing their antitrust claims against Hodgkins.[1] Defendant-appellees defend the District Court's grant of summary judgment but argue that the District Court erred in finding that defendants had the capacity to conspire and that the dispute was not exempt from antitrust enforcement under the McCarran-Ferguson Act, 15 U.S.C. § 1013 (1994).

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[1] This appeal concerns only plaintiffs' antitrust claims, and they made none against NML. Thus Hodgkins is the sole respondent on appeal.

Jurisdiction

This court has jurisdiction under 28 U.S.C. § 1291 (1994).

Standard of Review

This court reviews a grant of summary judgment *de novo*. *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir. 1993). Summary judgment is appropriate "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). We determine whether there are disputed facts after resolving "all ambiguities and draw[ing] all factual inferences in favor of" the non-movant. *A.F.A. Tours, Inc. v. Whitchurch*, 937 F.2d 82, 89 (2d Cir. 1991).

Background

The Insurance Company

Northwestern Mutual Life Insurance Company operates in the New York metropolitan area through a multi-tiered structure of independent contractor insurance agents with exclusive contracts; agents have the exclusive NML policy franchise and may sell policies for other carriers only after granting NML a right of first refusal. NML contracts with six General Agents, who in turn contract with Special Agents and with District Agents, who contract with Soliciting Agents.[2] General

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[2] For simplicity, we will refer to both Special and Soliciting Agents as Sales Agents.

Agents for NML usually have exclusive territories, but six General Agents share the New York area.

Agents are compensated by commission on policy writings and renewals according to their structural position in the NML hierarchy. Thus, General and District Agents receive an override commission on the commissions paid to Sales Agents contracted to them. The rates of compensation are incorporated into the agents' contracts and reflect a uniform commission and fee schedule used by all NML agents in each tier. Actual policy terms and premiums are established by NML. General Agents pay for recruiting and training their own District and Sales Agents.

The Metropolitan Agreement and NML Transfer Restriction Policy

What plaintiffs refer to as the "Metropolitan Agreement" ("the Agreement") is an agreement among NML General Agents not to recruit and hire each others' existing District or Sales Agents without the consent of the agent's current General Agent. According to Hodgkins, agent transfer restrictions initially were determined by "whatever the general agents agreed upon." A senior NML vice president characterized the Agreement as "among the general agents." At some point, the Agreement was reduced to a writing entitled the "Agreement for Open Territory for Both Solicitation and Development of the New York Metropolitan Area," providing that "[t]ransfer of agents between the General Agents will not be permitted."

NML literature referred to "friendly agreements" between NML General Agents which "restrict Agents from transferring from one agency to another within [a]

metropolitan area," adding that exceptions are made "by the mutual agreement of the General Agents involved." NML's legal staff, aware of the possibility that "a no-transfer policy can be considered to be a boycott or a refusal to deal," expressed concern about the antitrust implications of such agreements—that is, about "whether the 'no transfer' rule is effectively a restraint of trade." NML has made various references to the Agreement as an agreement of or among the General Agents.

In November 1989, NML met with the General Agents to discuss the transfer restriction policy, issuing a memo regarding the meeting entitled "New York Metropolitan Agreement." By December 1989, NML was referring to the Agreement as "Company Policy." NML viewed its own potential participation in the Agreement as arbitrating disputes over transfers.

The Bogans

Robert Bogan began his relationship with NML as a Sales Agent in 1976. In 1987, he became a District Agent, under Hodgkins' General Agency. Robert Bogan claims to have been a very successful District Agent, ranked fourth out of 300 nationwide. He also purports to have invested $1.5 million in the development and improvement of his District Agency. He asserts that during his tenure as District Agent, the District Agency increased from three to fifteen agents, while annual sales increased from $11 to $120 million.

Scott Bogan, Robert's brother, became a Sales Agent in 1985 under Robert's predecessor District Agent. After working briefly under Hodgkins, in 1987 he signed a Sales Agent's contract with Robert Bogan.

The Bogans' Termination

Robert Bogan and Hodgkins were involved in a long-running dispute concerning two Sales Agents whom Bogan accused of writing policies with other carriers in violation of the exclusive dealing clause in their NML contract.[3] Bogan claims Hodgkins told him not to interfere, as part of a plot to take over his District Agency and to give it to the two Sales Agents, who were Hodgkins' friends.

As the culmination of this dispute, on May 29, 1990, Robert Bogan was terminated by Hodgkins with thirty days notice, effective June 30, 1990. Upon Robert Bogan's termination, all Sales Agent contracts under him, including Scott Bogan's, were automatically terminated. In accordance with Bogan's District Agent contract, Hodgkins requested the records of the two Sales Agents. When Robert Bogan stalled and refused to comply with this request, on June 4, 1990, Hodgkins terminated him for cause, allegedly as a pretext to trigger the agent transfer restrictions.

During the dispute, Hodgkins had cited the transfer restriction, warning Bogan in writing shortly before his termination that "recontracting/transferring to another Metro/NYC office is *NOT* an option," and verbally that he could "either work for [Hodgkins] or get out of the business." Following his termination, Robert Bogan signed a Sales Agent contract with Gerald Gilbert,

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[3] The facts relating to the Bogans' termination are highly contested but relate only to their state law claims, not the antitrust claim at issue on appeal. Plaintiffs need not show enforcement of the alleged agreement in restraint of trade to prove their antitrust claim. *See American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). We therefore present these facts in abbreviated form simply to clarify the context of the litigation and as an example of the functioning of the Agreement.

another of the six NML New York General Agents. On June 11, 1990, Scott Bogan allegedly tried to contract as a Sales Agent under Robert Bogan acting as a District Agent under Gilbert as General Agent. NML refused to approve Robert Bogan's contract with Gilbert.

Robert and Scott Bogan then contracted as agents for Massachusetts Mutual Life Insurance Company, also in the New York area, retaining the offices they occupied as NML agents.

Issues on Appeal

On appeal, the Bogans raise several arguments to support their contention that the District Court erred in granting summary judgment to Hodgkins on their antitrust claim pursuant to the so-called "rule of reason."[4] First, they argue that the Agreement is *per se* illegal both as a horizontal agreement in restraint of trade and as a group boycott. Second, they ask that if we disagree with them that the Agreement fits into one of these established categories of *per se* illegal conduct, we establish a new category of *per se* illegal action to apply here. Third, they urge us to view the Agreement as a "naked restriction" so that it would invoke the abbreviated version of the rule of reason known as "quick look." Finally, the Bogans challenge the District Court's determination that the Agreement enhances interfirm competition, arguing (1) that the relevant market for analysis is the intrafirm (i.e., within NML) submarket for expe-

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[4] The rule of reason directs the trier of fact to "decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

rienced NML agents services; and (2) that the Agreement deleteriously affects that submarket by preventing NML General Agents from competing for the services of experienced NML agents. Because we find that the Bogans do not succeed on any of their theories, we need not reach Hodgkins' contentions on appeal that the District Court erred in not deciding in favor of Hodgkins on other grounds as well.

DISCUSSION

The parties disagree as to the origin and character of the transfer restriction policy. The Bogans' antitrust case depends on their allegation that the Agreement was primarily and initially a horizontal agreement between the General Agents rather than an NML policy.[5] The company's publication of the Agreement and later recharacterization of it as a company policy, however, indicate the existence of vertical elements. Whether the Agreement is purely horizontal, a mixture of horizontal and vertical, or purely vertical determines at least in part whether the Agreement is *per se* illegal or analyzed under the rule of reason.

In deciding what kind of antitrust analysis it should apply, the District Court stated that "[i]n resolving these

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[5] The Bogans are not estopped from alleging in this case that the Agreement was not NML policy, despite having characterized the restraint as such in state court. Generally, a party may not take a position inconsistent with that taken in a prior legal proceeding, where that party prevailed in the first case. *See Davis v. Wakelee*, 156 U.S. 680, 689 (1895). Where, as here, the party did not succeed, that party is not estopped from later inconsistent assertions. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis*, 903 F.2d 109, 114 (2d Cir. 1990). Thus, a party is not bound by a position not successfully maintained. *See In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990).

issues [it had to] first determine the proper characterization of the Metropolitan Policy under the Sherman Act." In making this determination, the District Court resolved issues of fact at summary judgment as to the nature of the alleged agreement in restraint of trade. This was error. But because the Bogans could not prevail at trial under *any* characterization of the Agreement, we affirm the District Court's grant of summary judgment. For the present analysis, we accept *arguendo* the facts as alleged by the Bogans as non-movants at summary judgment. Thus, we assume plaintiffs' view of the Agreement as primarily horizontal, rather than vertical.

The language of the Sherman Act is broad, prohibiting every contract, combination, or conspiracy in restraint of trade. *See* 15 U.S.C. § 1. Applying the rule of reason, the Supreme Court has read the Act to forbid only "unreasonable" restraints, as a literal reading would absurdly bar all contracts. *See Standard Oil Co. v. United States*, 221 U.S. 1, 60, 87 (1911). In particular, not all cooperative conduct has a deleterious effect on competition; indeed, some cooperative arrangements foster rather than harm competition. *See, e.g., Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 20 (1979) (noting that cooperative practices are acceptable if "designed to 'increase economic efficiency and render markets more, rather than less, competitive' " (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978))); *Board of Trade v. United States*, 246 U.S. 231, 240-41 (1918) (noting that futures trading created a public market for grain arrivals).

Certain practices, however, are so obviously anticompetitive that courts consider these to be *per se* violations of the Sherman Act. The Supreme Court has recognized

> certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreaso ableness . . . avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

Examples of *per se* illegal conduct include group boycotts, division of markets, and tying arrangements. *See id.* These categories reflect judicial experience with the rule of reason. *See Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344 (1982) ("Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.").

Only "manifestly anticompetitive" conduct, however, is appropriately designated *per se* illegal. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977). The majority of allegedly anticompetitive conduct continues to be examined under the rule of reason. *See Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 543 (2d Cir. 1993). Where cooperation is inherent in an enterprise, *per se* treatment is not always the appropriate measure of antitrust illegal-

ity. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985). Absent a showing that a presumption of anticompetitive effect is appropriate, we apply the rule of reason.[6] *See id.* at 297.

Courts have been reluctant to expand the categories of *per se* illegality. *See Bunker Ramo Corp. v. United Bus. Forms, Inc.*, 713 F.2d 1272, 1284 (7th Cir. 1983) ("A particular course of conduct will not be termed a *per se* violation . . . until the courts have had considerable experience with that type of conduct and application of the rule of reason has inevitably resulted in a finding of anticompetitive effects."). The Supreme Court has warned against "indiscriminately" expanding "the category of restraints classed as group boycotts," noting that "the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986). The Supreme Court is "slow to . . . extend *per se* anal-

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[6] Plaintiffs conceded at oral argument that they cannot succeed under the rule of reason, so the issue on appeal is only whether the Agreement is *per se* illegal. To avoid examining the relevant market, market power, and anticompetitive effect in all cases in which conduct does not clearly fit within a *per se* category, the Supreme Court has sanctioned an intermediate inquiry, known as "quick look," if the conduct at issue is a "naked restriction." *See NCAA v. Board of Regents*, 468 U.S. 85, 109 (1984). Under quick look, once the defendant has shown a procompetitive justification for the conduct, *see id.* at 113, "the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis," *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993).

Here, Hodgkins has countered the Bogans' characterization of the Agreement as a "naked restriction" with sound allegations of procompetitive benefit. Thus, at best the inquiry returns to the rule of reason, under which the plaintiffs concede they lose.

ysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." *Id.* at 458-59.

Thus, to trigger *per se* treatment the Bogans must present a "threshold case that the challenged activity falls into a category [of conduct] likely to have predominantly anticompetitive effects." *Northwest Wholesale Stationers*, 472 U.S. at 298. We find that the Bogans' allegations do not trigger *per se* treatment because the Agreement does not fit into any of the established *per se* categories.

The Agreement is clearly not a territorial or customer allocation because the record reveals no geographic or market division. The Bogans suggest that the Agreement may be a supplier allocation, but the facts do not bear this interpretation; the Agreement permits transfers, and experienced NML agents do not comprise the entire set of suppliers of their services. Thus, while the Agreement may constrain General Agents to some degree, it does not allocate the market for agents to any meaningful extent.

The Bogans' strongest argument is that the Agreement may be a group boycott in restraint of the market for insurance sales agents. Generally, group boycotts are illegal *per se*. *See Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). Not all such boycotts, however, are *per se* violations. *See Northwest Wholesale Stationers*, 472 U.S. at 298. The scope of the *per se* rule against group boycotts is a recognized source of confusion in antitrust law. *See Topps Chewing Gum, Inc. v. Major League Baseball Players Ass'n*, 641 F. Supp. 1179, 1186 (S.D.N.Y. 1986) (citing L. Sullivan, Handbook of the Law of Antitrust 229-30 (1977)). This Agreement, moreover, does not fit the classic model of

a group boycott—that is, a "concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level." *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1178 (D.C. Cir. 1978).

The categories of *per se* illegal practices are an approximation, a shortcut to reach conduct that courts can safely assume would surely have an anticompetitive effect. Thus, it is an element of a *per se* case to describe the relevant market in which we may presume the anti-competitive effect would occur. *See, e.g., Belfiore v. New York Times Co.*, 826 F.2d 177, 180-81 (2d Cir. 1987) (affirming summary judgment for the defendant because the plaintiff failed to prove the relevant market); *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.*, 614 F.2d 832, 840 (2d Cir. 1980) (noting that the plaintiff has the burden to prove the relevant market).

The Bogans allege that the General Agents conspired to restrain trade in the market for experienced NML sales agents. The Agreement is, therefore, not a classic interfirm horizontal restraint of trade in insurance sales agents. Rather it is akin to an *intra*firm agreement, one between General Agents of the same company to restrain trade only in experienced sales agents of that company. No-switching restriction cases typically involve multiple companies. *See, e.g., Quinonez v. National Ass'n of Sec. Dealers*, 540 F.2d 824, 826 (5th Cir. 1976); *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 333 (7th Cir. 1967). The agreement here is far from a typical *per se* illegal restraint, consistent with the fact that antitrust law shows more concern to protect inter- rather than intrabrand competition. *See Nynex Corp v. Discon, Inc.*, No. 96-1570, 1998 WL 856129, at *5-7 (Dec. 14, 1998);

Northwest Power Prods., Inc. v. Omark Indus., Inc., 576 F.2d 83, 87 (5th Cir. 1978).

Even if the Agreement were interfirm, we still would not afford it *per se* illegal treatment. We have previously identified interagency no-switching agreements as "distinguishable from those boycotts that have been held illegal *per se*." *Union Circulation Co. v. Federal Trade Comm'n*, 241 F.2d 652, 657 (2d Cir. 1957). Although such agreements fall within the ambit of antitrust law, we have nonetheless denied them *per se* treatment because "a harmful effect upon competition [was] not clearly apparent." *Id.* Because the Agreement's anticompetitive effect on the market for insurance sales agents is not obvious, we do not find the Bogans to have made a case sufficient to cross the threshold to *per se* treatment.

The Bogan's antitrust case might have been redeemed by their allegation that the Agreement restrains not the entire market but rather a submarket cognizable to antitrust analysis, if they had supported that allegation factually. *See NCAA*, 468 U.S. at 104 n.26 ("*Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct."). Defining a submarket is a fact-driven inquiry into

> such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962); *see also North Am. Soccer League v. NFL*, 670

F.2d 1249, 1260 (2d Cir. 1982) (holding that the record of the case disclosed a distinct submarket for sports capital and skill).

The Supreme Court has explained that the parameters of a market are defined by the cross-elasticity of demand between the product and its substitutes. *See Brown Shoe*, 370 U.S. at 325. While a submarket may function as the relevant market for antitrust purposes, more is required than a showing that a product differs from others. Submarkets do exist, notwithstanding the empirical difficulty of demonstrating them, but plaintiffs have not even made an effort to do so.

The Bogans argue that the specialized training and expertise of experienced NML agents creates a submarket distinct from the market for all NML sales agents (both new and experienced) and from the general market for insurance sales agents in New York. But they have introduced no factual evidence regarding the demographics of the New York insurance market. In the end, the problem with the Bogans' proposed submarket is that other insurance companies compete for the services of experienced NML agents, as is clearly evidenced by the Bogans having found other work after being terminated from NML.[7]

Plaintiffs have failed to show the allegedly relevant market to be a cognizable submarket. To the contrary, on these facts, the market for experienced NML agents is no more distinct than a market for the former employees of

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[7] Furthermore, the Bogans' submarket definition is inconsistent with their claim to antitrust injury. Given that NML is only one of many carriers in the New York area, any alleged conspiracy by General Agents to restrict intra-NML transfers would only *encourage* other insurers' entry into a hypothetically distinct market for experienced NML agents, increasing competition.

any single company. *See Disenos Artisticos e Industriales, S.A. v. Work*, 714 F. Supp. 46, 48-49 (E.D.N.Y. 1989) (granting summary judgment for defendant where plaintiff failed to show relevant submarket was single brand of figurines, not decorative giftwear market). Moreover, having stated only their own desire to retain their status as NML agents, plaintiffs have stated no facts upon which a reasonable jury could conclude that the asserted submarket would exist but for the transfer restrictions.

Conclusion

We affirm the District Court's grant of partial summary judgment for defendants on plaintiffs' Sherman Act § 1 antitrust claim. Plaintiffs fail to establish a threshold case for *per se* treatment for failure to specify the relevant market in which the horizontal agreement they allege could have an obvious anticompetitive effect.

Accordingly, the judgment of the District Court is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14 day of April one thousand nine hundred and ninety-nine.

Bogan,
Plaintiff-Appellant,

v.

Hodgkins,
Defendant-Appellee.

Dkt. No: 97-9295

Filed U.S. Court of Appeals
Second Circuit
April 14, 1999

A petition for rehearing panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Bogan.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
CAROLYN CLARK CAMPBELL, Clerk
By: s/
Beth J. Meador,
Administrative Attorney

91 Civ. 2221 (WCC)
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT M. BOGAN AND SCOTT M. BOGAN,
Plaintiffs,

-against-

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY AND AUSTIN E. HODGKINS, JR.,
Defendants.

OPINION AND ORDER

APPEARANCES:

DOAR DEVORKIN & RIECK
Attorney for Plaintiffs
Woolworth Building
233 Broadway, 10th Floor
New York, New York 10279-0173
MICHAEL S. DEVORKIN ESQ., Of Counsel

SCHNADER, HARRISON, SEGAL & LEWIS
Attorneys for Defendant
Northwestern Mutual Life
Insurance Company
330 Madison Avenue, Suite 1400
New York, New York 10017-5092
PETER JASON, ESQ., Of Counsel

BLEAKLEY, PLATT & SCHMIDT
Attorneys for Defendant
Austin E. Hodgkins, Jr.
One North Lexington Avenue
White Plains, N.Y. 10602-5056
TIMOTHY P. COON, ESQ., Of Counsel

CONNER, SENIOR D.J.

Plaintiffs Robert M. Bogan ("Bogan" or "Robert") and Scott M. Bogan ("Scott"), jointly and separately, have brought various claims against defendants Northwestern Mutual Life Insurance Company ("NML") and Austin E. Hodgkins, Jr. ("Hodgkins") on sixteen separate causes of action arising out of Robert Bogan's termination as an insurance agent.[1]

The only federal claim in this case is brought by both Robert and Scott Bogan against Hodgkins for federal antitrust violations (1st cause of action). Together they have also brought claims against Hodgkins for state antitrust violations (2nd) and tortious interference with prospective contractual relations with other General and Sales Agents (7th). Against NML they have brought a joint claim for tortious interference with existing contractual relations with Hodgkins (5th). They have also brought a claim for fraud against both Hodgkins and NML (11th).

Robert Bogan alone has brought claims against Hodgkins for: breach of contract (3rd), conspiracy to violate fiduciary duty (10th) and four claims for defamation (causes 14-17). He has brought claims against NML for: breach of written contract (4th), breach of implied contract (8th), and unjust enrichment (9th). Finally, he has brought claims against both defendants for conversion (13th), and tortious interference with his contracts with his Sales Agents (6th).

The asserted basis for jurisdiction in this case is a federal claim under the antitrust laws, with pendent jurisdiction over the state claims. While there would be diversity jurisdiction over the claims of Scott Bogan, a Connecticut resident, complete diversity does not exist because Hodgkins and Robert

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[1]There were originally 17 causes of action, but the 12th, under New York Deceptive Trade Practices, was dismissed by Judge Broderick. (See Order of 11/29/95).

Bogan are both New York Residents. Before the Court are Defendant Hodgkins' and Defendant NML's motions for summary judgment on all counts pursuant to FED. R. CIV. P. 56 (C).

BACKGROUND

Defendant NML insurance is a mutual insurance company that sells life insurance through a system of General Agents, District Agents, Sales Agents and Special Agents. NML contracts with its General Agents and generally assigns them each an exclusive territory. In the New York Metropolitan area, however, five General Agents share the same territory. General Agents, in turn, contract directly with District and Special Agents who are approved by NML. The District Agents in turn contract directly with Sales Agents. On the policies they sell, District, Special and Sales Agents are compensated by commissions on the initial premium and renewal premiums for the next nine years; General Agents receive an override commission on the commissions paid to the District, Special and Sales Agents.

Defendant Hodgkins, a New York resident, was during all times relevant to this dispute, a General Agent for NML in the New York Metropolitan Area. Robert Bogan started with NML as a Sales Agent in 1976. From 1982 to 1987, he managed a District Agency under Hodgkins and in 1987 became a District Agent under Hodgkins' General Agency. On May 29, 1990, he was terminated by Hodgkins with 30 days notice effective June 30, 1990. On June 4, after a dispute involving Bogan's failure to turn over his records to Hodgkins, he was terminated for cause.

Robert's brother Scott joined NML in 1985 as a Special Agent under Hodgkins' predecessor, Hamilton; he later became a Special Agent under Hodgkins. In 1987 he signed a Special Agent's contract under Robert. All of the contracts of the Special Agents in Bogan's District Agency, including that of

Scott, were terminated when Robert was terminated. As discussed above, Scott joins Robert in five of Robert's sixteen claims.[2]

As Robert Bogan presents them, the pertinent events leading up to his termination are as follows:

In 1990, Bogan was a highly successful District Agent for NML, ranked approximately fourth out of 300. Up until that point, he had invested over $1.5 million in the development and improvement of his District Agency. During his tenure as District Agent, the District Office size had increased from three to eleven agents, while annual sales had increased from $11 to $120 million. Bog. Aff. ¶¶141-149.

NML's agency contracts contain strict limitations on its agents' writing business with other carriers (exclusive agency clauses). Prior to his termination, some of Bogan's agents were violating their exclusivity clauses and when Bogan attempted to enforce the clauses, they complained to Hodgkins who "told him [Bogan] not to interfere with what his Soliciting Agents were doing and began to plan to take away Bogan's District Agency and give it to two of Bogan's Soliciting Agents who were friends of Hodgkins." Pl. Br. p. 4-5. On May 29, Hodgkins terminated Bogan without cause "even after NML had repeatedly promised in writing that it would not permit such terminations." *Id.* In a June 1 phone conference, Bogan told Dennis Tamscin, NML Senior Vice President - Agencies, some "very, very serious violations of the law have been committed by Hodgkins," that his agents were receiving checks from other

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[2]Scott Bogan has not submitted separate briefs to this Court but has relied upon Robert Bogan's submissions. Thus, throughout this opinion we will address the arguments presented by Robert Bogan, making explicit reference to Scott Bogan's claims only where they differ from Robert's.

insurers, and that "research needs to be done." Hdgk. Exh. J p. 6-8. Tamscin told Bogan to give Hodgkins access to the files or he would support Hodgkins' termination of Bogan for cause. Tamscin added that, if Hodgkins so terminated him, he would not be able to take his District Agency with him when he left. *Id.*

On June 4th at 8:00 a.m., Hodgkins went to Bogan's offices and demanded that he turn over "all of [his] records" and "refused to give him time to consult with his attorney as to his rights and to coordinate with his attorney an orderly transfer." Pl. Br. p. 4. Bogan asserts that there were legitimate questions regarding which records belonged to NML and which were his personal files and that he asked Hodgkins to wait an hour until 9:00 a.m. when Bogan's attorney would be available. Hodgkins refused and notified him that he would be terminated for cause effective at 5:30 that day. Bog. 3(g) stmt. ¶24. Scott Bogan's contract was also terminated (as were all of Bogan's Soliciting Agent's contracts), and he was told he could only recontract with the Hodgkins agency. *Id.* at ¶29.

Bogan alleges that Hodgkins terminated him wrongfully and that pursuant to an agreement amongst the General Agents he calls the "Metropolitan Agreement,"[3] once he was terminated

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[3]The origin and sponsorship of this "Metropolitan Agreement" are difficult to discern from Bogan's submissions to this court. He states in his 3(g) statement that "beginning no later than 1984, the General Agents reached an agreement called the Metropolitan Agreement which restricted agents in one agency from transferring to another area agency either voluntarily or upon termination." Bog. 3(g) stmt. ¶35. He apparently asserts that the substance of this agreement is contained in the document "Company Policy on Metropolitan Transfers." Bog. 3(g) stmt. ¶37 ("In 1989, NML decided for legal reasons that the Agreement would look better and have a better legal defense if it were called a company policy.").

For his part, Hodgkins apparently does not dispute that what he calls

for cause, he was prevented from either transferring as an active agent, or recontracting after his termination. It is this termination, the events that surrounded it and the alleged Metropolitan Agreement that give rise to the sixteen separate causes of action Bogan has brought before this Court.

Defendants' version, though largely in agreement, puts a different slant on the facts. They assert that there were numerous problems in Bogan's district agency, evidenced by the multiple complaints Bogan's Agents had made to NML. According to Tamscin, Bogan's Agents considered him "dictatorial", Tamscin Reply Aff. for NML, ¶41, and complained about his policy regarding expense reimbursement and outside business. For example, Bogan allegedly charged his agents $3.50 per page for faxes, and demanded 20% of any commissions on outside business done through his office. *Id.* at ¶¶14, 15. Tamscin testified that in January of 1990 representatives of the Special Agent's association (SAI -- Special Agents, Inc.) had talked to Bogan about the complaints they had received from his agents; in February 1990, Kent Beebe of NML visited Bogan's agency because of the "problems there;" and in April, Richard Storatz, one of Bogan's agents, wrote a letter to Tamscin in which he described Bogan as "a district agent run amok, subverting the values of the company from within." *Id.* at ¶¶41, 45, 48.

Hodgkins testified that prior to his termination of Bogan, he

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the "Metropolitan Policy," (*see* Hdgk. Exh. V), emerged from a 1989 meeting of NML General Agents. However, he asserts that the document is "improperly characterized" as an *agreement* amongst General Agents, when it is merely the NML company *policy*. Although Bogan, as the non-moving party, is entitled to have all disputed facts construed in a light favorable to him, for simplicity's sake, this Court will refer to Exh. V by its title -- the "Metropolitan Policy." However, for purposes of the merits of Bogan's claim, where relevant, this Court will assume that the General Agents agreed to its provisions.

and Bogan had attempted to "resolve some myriad of issues, and were making some progress, certainly in some areas, and other areas we weren't." Hdgk. Depo. p. 21. He states that Bogan offered to step down as District Agent if the difficulties could not be resolved. *Id.* at 189.[4] He adds that only then did he terminate Bogan without cause and that "Bogan's response . . . was to lock out two agents [Bob Slocum and Paul Wintrich]," Hdgk. Br. p. 1., and deny them access to their records including "one-card files" essential to an agents' ability to conduct day-to-day business. NML 3(g) stmt. ¶2. Hodgkins asserts that at that point, the Metropolitan Policy did not apply to Bogan as a former agent terminated without cause, and that he was free to transfer (alone, without his Soliciting Agents). Hodgkins states that only after Bogan refused his and Tamscin's demands to turn over the records did he fire Bogan for cause, thus rendering him unable to transfer to another General Agency.[5]

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[4]*See* Hdgk. Exh. C, 6/2 Memo from Bogan to Hodgkins, stating: "I'm sure we can find a livable/workable solution even if that means my stepping down."

[5]Hodgkins claims that this termination for cause was perfectly justified under Bogan's District Agency Contract. The contract provides in relevant part:

12. Records - District Agent shall hold and preserve all records relating to transactions by or for the company . . . and shall surrender them to the General Agent or the Company on demand.

20. Term of Agreement - . . .

It may be terminated by the General Agent upon written notice to the District Agent, by reason of . . .

(ii) Failure of the District Agent to com-ply with any of the terms hereof, . . . It may be terminated by either party at any time, without

Hodgkins asserts that he was justified in firing Bogan and that his termination was neither a breach of contract nor part of an antitrust conspiracy, but part of a strategy to improve the management of his General Agency. He has brought a motion for summary judgment on all counts of the Bogans' complaint. Because Bogan's antitrust claim is the asserted basis for federal jurisdiction, we discuss it first.

DISCUSSION

I. SUMMARY JUDGMENT STANDARD

Summary judgment should be granted when "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); *see Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). It must establish that there is a "genuine issue for trial." *Id.* at 587. "In considering the motion, the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight*, 804 F.2d at 11.

However, "antitrust law limits the range of permissible inferences from ambiguous evidence in a §1 case." *Matsushita*, 475 U.S. at 588. Specifically, "conduct as consistent with permissible conduct as with [an] illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* There must be direct or circumstantial evidence that "tends

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cause, upon thirty days' written notice.

Exh. A, NML 3(g) stmt.

to exclude the possibility that the [defendants] were acting independently." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). Moreover, in antitrust cases, "if the factual context renders [plaintiff's] claim implausible -- if the claim is one that simply makes no economic sense -- [plaintiff] must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary." *Matsushita*, 475 U.S. at 587; *Apex Oil v. DiMauro*, 822 F.2d 246, 253 (2d Cir.), *cert. denied*, 484 U.S. 977 (1987)(". . . the implausibility of a scheme will reduce the range of inferences that may permissibly be drawn from ambiguous evidence").

While "several courts have noted that summary judgment disposition of antitrust cases is difficult to obtain because of their inherent factual complexity, . . . that does not mean that summary disposition is thereby precluded or disfavored in antitrust law." *Capital Imaging Assoc., Inc. v. Mohawk Valley Medical Assoc.*, 996 F.2d 537, 541 (2d Cir.), *cert. denied*, 510 U.S. 947 (1993). Rather, "as the Supreme Court observed in *Matsushita*, summary judgment remains a vital procedural tool to avoid wasteful trials and may be particularly important in antitrust litigation to prevent lengthy and drawn-out litigation that has a chilling effect on competitive market forces." *Id.*

II. THE ANTITRUST CLAIM

A. *The Nature of the Antitrust Claim*

At the heart of Bogan's antitrust claim is the Metropolitan Policy which Bogan alleges was an agreement among NML General Agents not to compete for the services of existing agents by restricting their transfer. According to this document (whose full title is "NML Company Policy on Metropolitan Transfers"), *active* agents could not transfer between General Agents without the permission of both the agent's former and future General Agent. The Policy next provided that "agents who are 'terminated' by a General Agency will not

automatically be prevented from contracting with another General Agency unless [they were fired for cause]."[6] Bogan contends his firing on 30 days notice and subsequent dismissal for cause were unjustified, and that Hodgkins' actions in agreeing to the Metropolitan Policy and then firing him involve

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[6]The copy of the Metropolitan Policy submitted as Exh. V is very poor. This Court has attempted to transcribe it as accurately as possible. It states, in relevant part, that:

> Transfers within a metropolitan area are a touchy subject. Our first objective is to operate in the best interests of the Company and its General Agency system. Second, we seek reasonable solutions consistent with applicable federal and state law involving trade and commerce. In addition, we want to minimize Home Office interference in the conduct of local business because we feel it is contrary to the spirit of the General Agency System. However, the Company and the General Agents have to protect investments of time, energy and money in the recruitment, training, development and support of agents and in the General Agency system. Therefore, we need to operate within certain guidelines to provide a modicum of structure and some basic "rules of the road" with reference to transfers, especially in areas where several Agencies operate within the same territory.
>
> Our policy on operating General Agencies in metropolitan areas, as it relates to transfers, is as follows:
>
> 1. *Active, contracted Agents* residing within shared territory *shall not transfer between General Agencies without the approval of both General Agents*. (This includes proposed transfers where a change in contract to include management or specialist responsibilities is involved.) . . . .
>
> 3. *Agents who are "terminated"* by a General Agency *will not automatically be prevented from contracting with another General Agency unless the reasons for termination involved failure to comply with company rules or ethical practices or to meet other standards for holding a Northwestern Mutual Contract*.

Bog. Exh. V (emphasis added).

a course of conduct designed to exclude him from the NML system that constitutes "a contract, combination and conspiracy in restraint of trade or commerce in violation of § 1 of the Sherman Act, 15 U.S.C. § 1."[7] As best we can ascertain from Bogan's rather confusing claim, he seems to allege that the Metropolitan policy enabled Hodgkins to: (1) wrongfully prevent Bogan's transfer while he was an active agent (*see* ¶ 1 of the Policy), and (2) continue to exclude Bogan from recontracting with another NML agency thereafter by deliberately trumping up a "cause" for dismissal (*see* ¶ 3). Bogan does not accuse the other General Agents or NML itself of violating § 1.

In response, Hodgkins contends, first, that the Metropolitan Policy is exempt from the antitrust laws under the McCarran-Ferguson Act; second, that he cannot conspire with other NML General Agents; and third, that the Metropolitan Policy was not a violation of § 1 but merely a perfectly legal mechanism which NML and the General Agents use to protect their investment in the training of their agents. Hodgkins further states that after he fired Bogan, the Policy's restrictions on transfer did not

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[7]As a preliminary matter, we assume that Bogan has standing to bring an antitrust claim here. As a prominent commentator has noted, most courts have concluded that "employees may challenge antitrust violations that are premised on restraining the employment market but not violations premised on restraining competition in the downstream product market in which their employers sell." AREEDA, ANTITRUST LAW, ¶ 377a, p. 311. *But see Balaklaw v. Lovell*, 14 F.3d 793, 800 (2d Cir. 1994). *Balaklaw* held that a doctor excluded by a hospital did not have standing under the antitrust laws because he had not shown anticompetitive effects in the relevant market. Since the question of the proper market is central to the analysis of the underlying antitrust claims, rather than summarily dismissing this case without analysis of the merits of those claims, we reserve consideration of this matter for our discussion of the § 1 conspiracy claim.

apply to Bogan because Bogan was no longer an active agent, that he justifiably terminated Bogan for cause, and at that point it was NML, not he, who exercised control over Bogan's ability to recontract. We consider these contentions separately in the order listed.

B. *Antitrust Exemption under the McCarran-Ferguson Act*

According to the Supreme Court, the primary purpose of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*,[8] was to insure the continued regulation of the insurance industry by the states; its secondary purpose was to allow only a limited exemption from the antitrust laws. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 218 n.18, 221 (1978) (emphasis added) (The McCarran-Ferguson Act was designed primarily to enable insurers to collaborate on cooperative rate making without violating the antitrust laws.). In order to determine whether the Sherman Act applies to particular

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[8]Section 1012 of the McCarran-Ferguson Act provides in relevant part:

> (a) The *business of insurance*, and every person engaged therein, *shall be subject to the laws of the several States* which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; *Provided, That* after June 30, 1948, *the Act* of July 2, 1890, as amended, *known as the Sherman Act, and the Act* of October 15, 1914 *known as the Clayton Act*, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, *shall be applicable to the business of insurance to the extent that such business is not regulated by State law.*

15 U.S.C. § 1012 (emphasis added).

conduct of an insurer, the Court has developed a three-pronged analysis for construing the McCarran-Ferguson Act: conduct that (a) constitutes the business of insurance (b) is regulated by state law, and (c) does not constitute a boycott, is exempt from the Sherman Act. *See Royal Drug Co.*, 440 U.S. at 207; *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982).

To determine whether a particular practice of an insurance company constitutes the "business of insurance," the Supreme Court has articulated a further three-part test: First, whether the practice has the effect of transferring or spreading a policy holder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. *Pireno*, 458 U.S. at 129.

Our application of this test leads us to conclude that restrictions upon the transfer of subordinate agents does not constitute the business of insurance, and that the McCarran-Ferguson Act therefore does not bar Bogan's claims. The basic purpose of the Act was to allow insurance companies to coordinate their policy structures to facilitate spreading their risks. We do not see how the Metropolitan Policy meaningfully furthers this goal. NML's proffered justification -- that transfer restrictions result in increased training and thus better qualified NML Sales Agents -- is evidence of a procompetitive advantage of the Policy. We are not convinced by Hodgkins' argument that this training serves the purposes of the McCarran-Ferguson Act and satisfies the *Pireno* test (promoting the spreading of risks and constituting an integral part of the contract between the insurer and the insured). Moreover, Hodgkins has not adequately established that the Metropolitan Policy is a matter regulated by state law. Thus, we deny Hodgkins' motion insofar as it contends that Bogan's claim is barred by the McCarran-Ferguson Act and proceed to a consideration of the merits of the claim under the Sherman Act.

C. *The Ability of General Agents to Conspire*

A violation of § 1 requires concerted action among two or more persons; § 1 does not proscribe independent action. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *Schwimmer v. SONY Corp. of Am.*, 677 F.2d 946, 952 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982). Hodgkins urges that *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984), establishes that the General Agents are parts of a single corporate entity and cannot conspire as a matter of law. In that case, the Supreme Court held that a parent could not conspire with its wholly owned subsidiary. The Court explained that "A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one." *Id.* at 771.

The *Copperweld* Court provided an important limitation to its decision, however, cautioning that: "We limit our inquiry to the narrow issue squarely presented: whether a *parent* and its *wholly owned subsidiary* are capable of conspiring in violation of § 1 of the Sherman Act. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own." *Id.* at 767 (emphasis added). In this case, the General Agents are not wholly owned subsidiaries of NML. Indeed, NML has no ownership interest in the General or District Agencies, S. Bog. Aff. ¶ 16., and NML is not charged with participating in the conspiracy. Thus, *Copperweld* is not controlling.

Similarly, the Second Circuit has said that "collaborative action between a corporation and its employees, *or among employees within a corporation,* is not regarded as joint action within the meaning of § 1." *Schwimmer*, 677 F.2d at 953 (emphasis added). However, a corporation's wholesalers or dealers are capable of conspiring in violation of § 1. *Id.*; *see also United States v. General Motors Corp.*, 384 U.S. 127

(1966)(franchised auto dealers capable of conspiring with their franchisor); *Bowen v. New York News*, 522 F.2d 1242, 1256 (2d Cir. 1975)(newspaper publisher guilty of formulating a § 1 conspiracy with its exclusive franchised dealers to restrict the sale of newspapers to independent resale dealers); *Borger v. Yamaha Intern. Corp.*, 625 F.2d 390, 395 (2d Cir. 1980). In addition, it is clear that, outside of baseball, sports organizations are capable of conspiring with their member clubs in violation of the antitrust laws. *See, e.g., Mackey v. NFL*, 543 F.2d 606, 618-19 (8th Cir.), *cert. dism'd*, 343 U.S. 801 (1977)[9]; *Chicago Prof'l Sports Lim. Partnership v. N.B.A.*, 961 F.2d 667 (7th Cir. 1992). Thus, in order to determine whether NML General Agents are capable of conspiring, it is important to determine whether they are more like employees or independent franchisees.

Some of the factors that suggested to the Second Circuit in *Bowen* that the dealer-franchisees were independent operators were: that they were labeled as "independent contractors" in

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[9]This case and *Smith v. Pro Football*, 593 F.2d 1173 (D.C. Cir 1978), were criticized by the Second Circuit as being inconsistent with its ruling in *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987). *See U.S. Football*, 842 F.2d at 1372. *Wood* held that a basketball player's claim that certain practices of the NBA teams were a *per se* violation of § 1 was preempted by the collective bargaining provisions of labor law. *Wood*, 809 F.2d at 958-62 (challenging salary cap, college draft and prohibition of player corporations arrived at through collective bargaining.) *Smith* ruled that the labor laws do not preempt a challenge to the NFL draft under the antitrust laws. *Smith*, 593 F.2d at 1179 n.22. *Mackey* ruled that a challenge to an NFL league rule regarding compensation of free agent's former club by new owners was not preempted by the labor laws because it was not the product of bona fide arm's length bargaining. *Mackey*, 543 F.2d at 615. It appears that all that the *Wood* court intended to criticize were the portions of the *Smith* and *Mackey* decisions which ruled that there was no preemption.

their contract with the newspaper; that they had sole discretion to hire, discharge and supervise those engaged by them to carry out their delivery function; that they had sole discretion to determine the manner in which collections and deliveries were to be made; and that they had no right to return unsold copies. In addition, subscribers were considered to belong to the franchisees, and the newspaper had the right to buy a franchisee's customer list only if it were terminated. *Id.* at 1252-53. Thus, the court found that the newspaper had intended to "cast some risk, although relatively slight, on the franchise dealer." *Id.* at n.8.

In *Fuchs Sugar & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025 (2d. Cir.), *cert. denied*, 444 U.S. 917 (1979), the Second Circuit discussed the important factors in determining whether a corporation is legally capable of conspiring with its agents.[10] As the Second Circuit explained:

> Whether . . . two actors constitute distinct economic entities for purposes of the Sherman Act is determined by the economic realities of their relationship. In the context of the principal/agent relationship this analysis requires consideration of a number of elements which include: whether the agent performs a function on behalf of his principal other than securing an offer from a buyer for the principal's product; the degree to which the agent is authorized to exercise his discretion concerning price and terms under which the principals product is to be sold; and finally, whether use of the agent constitutes a

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[10]This discussion was not essential to the holding in *Fuchs*. Relying upon the insufficiency of evidence of a conspiracy, the *Fuchs* Court found that a Sugar refiner and its general (non-exclusive) brokers were not guilty of a §l conspiracy in restraint of trade because in eliminating the general dealers (in favor of exclusive dealers), the refiner had acted unilaterally. *Id.* at 1031.

> separate step in the vertical distribution of the principal's product.

Id. at 1031 (citations omitted). Since the plaintiffs acted "solely as conduit[s]" through which Amstar would negotiate the initial distribution of its sugar, they never purchased the sugar or competed with Amstar in its distribution or sale, Amstar never held them out as competitors, and the terms of the resultant sale were exclusively determined by Amstar, "rather than representing a separate and independent step in the distribution process, the sugar broker was merely an agent." *Id.* at n.5. *See also Williams v. Fisher Nevada*, 999 F.2d 445, 447 (9th Cir. 1993) (Jack-in-the-Box franchisor incapable of conspiring with franchisee to implement no-transfer agreement because they are part of a common enterprise.").

However, the Second Circuit has found members of a physician's group capable of conspiring under § 1. *Capital Imaging v. Mohawk Valley Medical Assoc.*, 996 F.2d 537, 545 (2d Cir. 1993)(noting that the doctors were not staff physicians of the HMO *nor its agents*, but independent practitioners with separate economic interests). In finding that a parent and its wholly owned subsidiary are incapable of conspiring, the Southern District of New York noted that a "single corporation and *its agents and employees* are normally treated as a single actor for antitrust purposes except *where the individuals or subentities are held out as competitors." Reborn Enter., Inc. v. Fine Child, Inc.*, 590 F. Supp. 1423, 1437 (S.D.N.Y. 1984) (emphasis added), *citing* R. GIVENS, ANTITRUST: AN ECONOMIC APPROACH § 16.03, at 16-11 (1984).

Bogan's relationship with Hodgkins and NML has some similarities to that of the franchised newspapers dealers in *Bowen*. Bogan's District Agency contract itself recites that he "shall be an independent contractor and nothing herein shall be construed to make District Agent an employee of the Company or General Agent." *See* Hdgk. Exh. A. The contract goes on

to state the "District Agent shall be free to exercise his own judgment as to the persons from whom he will solicit Applications and the time, place and manner of solicitation, but the Company from time to time may adopt regulations respecting the conduct of the business covered hereby, not interfering with such freedom of action of District Agent." *Id.* While all Agents selected by a District Agent must be approved by NML, the District Agent is responsible for all "expenses, costs causes of action and damages resulting from or growing out of acts or transactions by himself, his employees his agents or persons appointed by him." *Id.* Thus, according to the terms of the contract at least, while he does not have absolute control over hiring and firing, a District Agent certainly bears more than a "relatively slight" risk. *Id.*[11] If a District Agent's position in the Company has aspects that are independent from NML's control, certainly his General Agent would enjoy at least as great a degree of independence, since a District Agent works under the supervision of his General Agent.

Bogan argues that General Agents cannot be considered a part of a single entity because they compete against each other to sell policies and for the services of the best subordinate agents in order to maximize their personal wealth. We agree for several reasons. First, although it appears that, like the

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[11]It is not clear, however, that the contract should be taken at face value. Both parties, at various times, urge that the contract is not representative of the actual relationship between the parties. Although Bogan strenuously urges that the General Agents are not one entity with NML, at another point he contends that "NML has treated all agents as agents of NML and it regularly controls their conduct by various means, up to and including directing or threatening their termination." (Pl. Br. p. 3, Bog. Aff. ¶¶ 24-34). Hodgkins, likewise, while insisting that NML and its various agents should be treated as one entity, allegedly has "repeatedly stated" that NML does not control the agents and that they are free to run their own businesses. Tamscin Aff. ¶ 16; S. Bog. Aff. ¶ 16.

sales agents in *Fuchs*, the General Agents of NML do not exercise discretion concerning the prices and terms of the policies their subordinate agents sell because NML establishes standard policy coverage and rate structures, Bogan argues that General Agents can compete for the sale of policies by permitting their District and Soliciting Agents to vary the level of service to and advocacy for the client. As he describes it, an Agent who puts the client first can offer not only superior services but a superior product. For example, the Agent can "do his best to obtain a non-rated policy or present[] the best policy alternative to the client so that the interests of the client and not the carrier are best served." Bog. Br. p. 27. One example of such a policy alternative offered by Bogan is an Agent's decision to recommend a particular combination of "whole life" versus "term life" coverage. According to Jeffrey Grabel's testimony, whole life policies generally offer greater compensation to Agents. An agent who "puts the client first" might recommend a greater percentage of term-life coverage, even though such a recommendation is contrary to the Agent's -- and his superiors' -- pecuniary interests. Grabel Aff. ¶¶ 9-15. In view of the important role agents play in the structuring and servicing of policies, we find that the General Agencies constitute a "separate step" in the vertical distribution of NML's product.

Second, although the commissions paid to Agents are fixed by NML, General Agents allegedly compete for District and Soliciting Agents by varying the amount of training the agents receive, as well as the percentage of rent, supplies and secretarial services for which they are reimbursed. R. Bogan Aff. ¶ 8.

We therefore conclude that the General Agents exercise sufficient independent control over their agencies, have adverse interests and compete among themselves to a sufficient degree

to render them legally capable of conspiring against each other.[12]

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[12]Hodgkins urges that this court should follow the Tenth Circuit's lead in *Card v. Nat'l Life*, 603 F.2d 828 (10th Cir. 1979), affirming a summary judgment for an insurer accused of conspiring with its General Agents to establish and enforce an exclusive agency agreement. There, the General Agents of National Life formed a corporation known as the General Agents Association, which was owned, controlled and financed by National Life General Agents. The General Agents met with officers of National Life and consulted with them on all major policy decisions. *Id.* at 830. (According to Tamscin, the General Agents of NML also had an "independent" organization, with its own officers and management, to "handle matters of interest to their members and represent their members' interests in matters pertaining to their relationship with NML." *Tamscin Aff.* (Scott Bogan) ¶ 8.)

The Tenth Circuit found this Association, as well as individual general agents to be "really part of the National Life Structure" and thus incapable of being regarded as conspirators. *Id.* at 834. *See also Pa. Indep. Bus. Assoc. v. Unicorn Mktg.*, 1985 WL 2812 at *3-4 (If a corporation and its independent and separately incorporated subsidiary cannot form an antitrust conspiracy because the required 'different interests' do not exist, then it is highly unlikely that a corporation can conspire with its agents . . . An agent's interests ultimately coincide with those of the corporation and do not constitute the different interest required for concerted action under the antitrust laws.")

However, in addition to having very little solid information as to what the role of the NML General Agents' association was in the formation of NML company policy, we do not believe the exclusive agency agreement at issue in *Card* to be analogous to the no-transfer agreement at issue here. In *Card*, all General Agents had the *same* interest in disallowing the writing of outside business by their subordinate agents -- the loss of prospective commissions. Here, the General Agents have competing interests in recruiting the most productive agents from other General Agencies. Therefore, we do not find *Card* compelling.

D. *The Applicable Antitrust Analysis*

Hodgkins further argues that even if the Metropolitan Policy was an agreement among the General Agents to restrict transfer of subordinate agents, it was not illegal because, in order to establish a violation of the antitrust laws, Bogan must show anticompetitive effect on the (consumer) market under the rule of reason. Bogan counters that the alleged conspiracy should be considered the type of group boycott that is *per se* illegal, or in the alternative should be analyzed under the "quick look" rule of reason. In resolving these issues we must first determine the proper characterization of the Metropolitan Policy under the Sherman Act, and correspondingly, the proper legal standard to apply to this conduct.

Although § 1 of the Sherman Act prohibits any contract, combination, or conspiracy in restraint of trade or commerce among the several states, 15 U.S.C.A. § 1, it has long been established that § 1 proscribes only unreasonable restraints. *K.M.B. Warehouse Distrib. v. Walker Mfg.*, 1994 WL 250115 (S.D.N.Y.), *aff'd*, 61 F.3d 123 (2d Cir. 1995), (citing *Standard Oil Co. v. United States*, 221 U.S. 1 (1911)). The Supreme Court has stated, that "[s]ince the early years of this century a judicial gloss on this statutory language has established the 'rule of reason' as the prevailing standard of analysis." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). Certain business practices are deemed illegal *per se*, however, "because of their pernicious effect on competition and lack of any redeeming virtue." *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958). These practices and agreements are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id.* Some examples of *per se* illegal arrangements are certain boycotts, horizontal territorial restrictions, and both horizontal and vertical price-fixing schemes. *See Capital Imaging*, 996 F.2d

at 537-538; *U.S. v. Topco, Inc.*, 405 U.S. 596 (1972); *Klors Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207, 211-12 (1959); *K.M.B. Warehouse*, 1994 WL 250115 at *3.

It is difficult to determine the exact nature of the conspiracy alleged by Bogan and the appropriate label to give it for the purposes of legal analysis, in particular to determine whether such an agreement would constitute a vertical or horizontal restriction on trade. Bogan would have us conclude that it is a horizontal agreement (among the General Agents) to allocate the market for the services of NML agents enforced by a group boycott that is illegal *per se*. As the Second Circuit has noted, the definition of a group boycott that is *per se* illegal is rather elusive and the cases discussing the issue are "fraught with uncertainty and doubt." *US Football League v. Nat'l Football League*, 842 F.2d 1335, 1372 (2d Cir. 1988), *(comparing Klor's*, 359 U.S. at 297 ("'[g]roup boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden *[per se]* category.'"), *with Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 30-31 (1984)("exclusion of physician from hospital staff privileges not violation of antitrust laws '[w]ithout a showing of actual adverse effect on competition' in product market"), *and Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296 (1985)("group boycott was not *per se* illegal absent proof that buying cooperative possessed market power.")).

While the case law is difficult to parse, the Court of Appeals for the District of Columbia has provided some helpful instruction on the matter. It stated that: "The classic 'group boycott' is a concerted attempt by a group of competitors at one level to protect themselves from competition from *non-group* members who seek to compete at that level . . . . *It is this purpose to exclude competition that has characterized the Supreme Court's decisions invoking the group boycott* per se

rule." *Smith v. Pro Football*[13], 593 F.2d 1173 (D.C. Cir 1978)(bold emphasis added), *cited in Topps Chewing Gum v. Major League Baseball Players*, 641 F. Supp. 1179, 1186-87 (S.D.N.Y. 1986). Like other types of conduct found illegal *per se*, these classic group boycotts "involve a type of arrangement that is so clearly and consistently anticompetitive that it is inherently illegal." *Topps*, 641 F. Supp. at 1187-88.

This definition does not seem to fit squarely the situation in this case. Though the General Agents occupy the same level in the market and we have assumed that they have sufficient independence to conspire and that they do compete to a certain extent, *see* section II(C), *supra*, it seems illogical for Bogan to claim that the General Agents have conspired to exclude *themselves* from a most attractive part of the market for labor. Bogan has not alleged that a subset of General Agents are excluding others, or that they are excluding non-NML agents. The Metropolitan Agreement purportedly prevents other General Agents from recontracting with an agent terminated for cause, thus excluding not only subordinate agents, but the General Agents themselves from the excluded agent's continued commissions. In this scenario, there is no classic outsider at the same level being excluded unless the General Agents are excluding themselves -- Bogan does not occupy the same level as the General Agents. Thus, Bogan's claim, if styled as a group boycott, approaches the type of implausible assertion frowned upon in *Apex Oil, supra.*[14] In addition, NML does

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[13]Recall from fn.9 that this case and *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir.), *cert. dism'd*, 434 U.S. 801 (1977), were criticized by the Second Circuit, likely on the issue of labor law preemption of the antitrust laws.

[14]In making this statement, we do not mean to suggest that we are convinced that Hodgkins' proffered justification for firing Bogan was not pretextual and that the Metropolitan Policy did not provide some

not appear to possess the requisite market power required by the Supreme Court in *Northwest Wholesale Stationers, supra*, before a boycott will be found *per se* illegal. According to Hodgkins, NML "holds only 4% of the relevant insurance market." Hdgk. Br. p. 30. Nowhere does Bogan challenge this assertion or suggest that NML has market power in the insurance market.

Furthermore, although Bogan has alleged that only the General Agents were involved in any conspiracy to restrict transfer, the evidence presented to this Court makes it apparent,

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assistance to Hodgkins in his efforts to end Bogan's relationship with NML. Although Hodgkins offered considerable evidence that some of Bogan's subordinates considered him a difficult and "dictatorial" supervisor, the facts as Bogan presents them paint a picture that he was highly successful and that he was drummed out by Hodgkins, who conditioned his further employment on his allowing his Soliciting Agents to break their exclusive agency contracts with NML. Bogan suggests this was a mere pretext for taking over his agency. Hodgkins counters that he fired Hodgkins for legitimate reasons -- causing unrest in the office and refusing to turn over Slocum and Wintrich's records -- and that the absence of a conspiracy is shown by the fact that another General Agent *did* agree to contract with Bogan. Hodgkins adds that it was NML (not Hodgkins) that disapproved of the Bogan's proposed contract with another General Agent, that NML was perfectly justified in doing so, and that Bogan's failure to sue NML itself for antitrust violations is instructive. While these facts provide evidence that there was no such conspiracy, they do not establish that conclusion as a matter of law. A reasonable jury might find that through the Metropolitan Policy, Hodgkins and NML used coercion aimed at getting Bogan to "go along" with Hodgkins' alleged policy of "don't ask, don't tell" with respect to the Soliciting Agents' violations of their exclusive agency contracts, that Bogan was not justly fired for cause, and that the Metropolitan Policy that facilitated his permanent termination could be considered a "boycott." All this being said, we still cannot conclude that the challenged pattern of behavior constitutes the type of boycott that is illegal *per se*.

however, that NML played an indispensable (if not unilateral) role in enforcing the Metropolitan Agreement. Bogan himself testifies "In the Metropolitan New York Area, the General Agents and Northwestern Mutual have entered into a separate agreement strictly limiting the ability of any soliciting agent to transfer from on General Agency to another." Bog. Aff. in Opp. to Hdgk. Motion for Order to Surrender Documents ¶ 4, NML Exh. 22.

It certainly appears that NML enforced any such General Agent agreement. For example, prominent NML officers sided with Hodgkins in his dispute with Bogan. *See e.g.*, tape of 6/1/90 conversation between NML Vice President Dennis Tamscin and Robert Bogan, Hdgk. Exh. J., ("You must give Brud [Hodgkins] access to any records in the District Agency . . . "). Tamscin, however, asserts that NML by no means encouraged or even tolerated violations of the exclusive agency agreements, and did not encourage Hodgkins to send Bogan the 30-day notice, but merely "agree[d] with Hodgkins that Bogan's continued refusal to turn over the agents' records justified his termination for cause and NML tried as best it could to persuade Bogan to release the records to avoid termination for cause." Tamscin Reply Aff. ¶ 19.

In addition, the parties do not dispute that Bogan had actually signed a preliminary Special Agent's contract with another General Agent (Gerald Gilberg) and that it was NML that disapproved the contract after Bogan was terminated for cause. *See* Hdgk. Exh. N, G. Gilbert Depo. p. 114. There is no evidence that any other General Agents were involved in this particular decision, other than their alleged agreement to the Metropolitan Policy concerning such matters. These facts cut against Bogan's argument that the General Agents were part of an organized conspiracy to restrict transfer, but cannot defeat the assertion as a matter of law. It certainly appears likely that at least in this instance, without the enforcement arm of NML,

any such conspiracy among the General Agents would have failed.

Tamscin also avers that it was NML itself who wanted the policy in the first place. Tamscin Aff. ¶ 37 ("NML has traditionally encouraged its General Agents to try to reach agreement as to the circumstances under which they would approve transfers within their territories. NML not only encouraged such agreements, but typically drafted the agreements and met with the General Agents involved in order to help resolve any differences among them in order to reach an agreement that would be acceptable to them and NML"). A 1989 letter from Kent Beebe to Hodgkins states that:

> . . . the Company has developed its policies regarding transfers and recontracting in order to foster orderly development of all general agency territories, especially those in major metropolitan areas. As you know, the Company as a general rule does not allow transfers between metropolitan agencies. Prohibiting transfers protects each general agent's investment of time, energy and money in the recruitment, financial support and development of agents . . .

G. Gilberg Exh. A.

Tamscin states that the General Agents never agreed to the policy (NML's efforts were "singularly unsuccessful"), and that Mr. Beebe of NML then sent out a copy of the document Bogan calls the Metropolitan Policy as part of a memorandum sent to all General Agents. Tamscin Aff. ¶ 38; G. Gilbert Depo p. 334; *see also Hdgk.* reply Aff. ¶ 4. The memo reads, in part:

> While it is pretty obvious that we will not all agree on each and every subject, the opportunity to constructively share concerns, values and ideas is always valuable.
>
> Since our meeting we have been conferring with the

> Law Department about the transfer rules we discussed. They have advised us of the state of the law on a number of issues implicit in our efforts to legitimately control transfers in the best interests of the Company and its general agents. We are convinced that the most effective control is a company policy which addresses your concerns without placing unfair or unreasonable restraints on agents or former agents.
>
> Therefore, the principles which we discussed have been revised with the help of counsel and are set forth in the attached Company Policy on New York Metropolitan Transfers . . .
>
> I want to stress once again the ultimate objective which is the development of such strong metropolitan relationships that you are able to handle your situations and difficulties without Home Office intervention. We continue to believe that the existence of excellent relationships among our General Agents sharing the New York Territory is the paramount issue, because with good relationships and a desire to "do the right thing" most disputes will disappear.

G. Gilberg Depo. Exh. B, S. Gilbert Depo. Exh. A.

At minimum, these facts suggest strong vertical aspects to the alleged combination or conspiracy.[15] Bogan's decision not to assert an antitrust claim against NML does not change this

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[15]There are countless cases discussing whether to denominate similar agreements as vertical or horizontal conspiracies. Many find such arrangements to be vertical. *See, e.g., Blanton Enter., Inc. v. Burger King Corp.*, 680 F. Supp 753, 765 (D.S.C. 1988) (refusal by Burger King of franchise to plaintiff was vertical restraint, despite complaints of franchisees). We believe, however, that the best characterization of the Metropolitan Agreement is that it was both vertical and horizontal in nature.

reality. Thus, Bogan's characterization of the Metropolitan Policy as the type of *per se* illegal boycott quintessentially entered into by horizontal competitors to exclude outsiders is highly dubious.

Nor does this case involve a horizontal conspiracy affecting prices. The Supreme Court has found franchised auto dealers liable under the *per se* rule for conspiring with their franchisor to restrict price competition. *See United States v. General Motors Corp.*, 384 U.S. 127 (1966). In *General Motors*, a number of exclusive dealers, each of whom GM had franchised to sell its cars in a different Los Angeles location, began reselling GM cars to discount houses that then resold to consumers. Other franchise dealers complained to GM, who reacted by obtaining an agreement from each not to resell to discounters. Three associations of franchise dealers jointly policed the agreements by supplying information to GM who met with the dealers to discourage the practice and to request that the cars sold to discount houses be repurchased. *Id.* at 129-38.

In defense of its practices, GM argued that the resales violated the "location clause" in its franchise agreements. The Supreme Court did not question the legality of such agreements, or that GM itself might have taken unilateral action to enforce them. However, it stated:

> We have a classic combination in restraint of trade: joint, collaborative action by dealers, the . . . associations, and General Motors to eliminate a class of competitors by terminating dealings between them and a minority of Chevrolet dealers and to deprive franchised dealers of their freedom to deal through discounters if they so choose. Against this fact of unlawful combination, the "location clause" is of no avail. Whatever General Motors might or might not have done to enforce individual dealer Agreements by action within the borders

> of those agreements and the relationship which each defines, is beside the point.

Id. at 140. The Court was careful to point out, however, that "inherent in the success of the combination in this case was a substantial restraint upon *price competition* -- a goal unlawful *per se* when sought to be effected by combination or conspiracy. *Id.* at 147 (emphasis added).

Bogan argues that the Metropolitan Agreement significantly affects price competition. We disagree. The "price" that Bogan asserts is affected by the Metropolitan Agreement's limitation on transfer is the total compensation provided to NML District, Sales and Soliciting Agents. While Bogan concedes that an NML Agent's commissions are fixed regardless of who his supervising agents are, he asserts that General Agents have significant discretion in the amount they reimburse their subordinate agents for rent, secretarial services, and supplies and that this discretion would create "wage" competition if the subordinate agents were permitted to transfer between general agencies. Bog. Aff. ¶ 8; *see* section II(C), *supra*. While this may well be the case, it does not help Bogan here because, as discussed below, his definition of the relevant market as consisting only of the services of NML agents is unacceptable. The market is properly considered the entire industry (or at least the New York Metropolitan area), and thus any restriction on wage competition in NML's small share of the industry does not seriously affect such competition in the industry as a whole.[16] Thus, the Metropolitan Policy cannot

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[16]Bogan argues that even if agent services are not considered a market, the Sherman Act protects the benefits of competition in "vital matters such as claim policy and quality of service." Bog. Br. p. 27 (citations omitted). While he is certainly correct about the law, he is still incorrect in defining the proper market -- it is not simply *NML* claim policies and the quality of service available to NML customers that is

be considered a restriction on price competition that would fall under the *per se* analysis.

In a situation the Second Circuit found to be "remarkably similar" to that condemned in *General Motors*, the court found a newspaper publisher guilty of formulating a §1 conspiracy with its exclusive franchised dealers to establish exclusive territories. *Bowen v. New York News*, 522 F.2d 1242, 1256-58 (2d Cir.), *cert. denied*, 425 U.S. 936 (1976). The obvious effect of the agreement was to prevent competition in the sale of newspapers to independent resale dealers. *Id.* The territorial restriction was apparently held illegal *per se*, since the Second Circuit did not discuss whether it was performing a *per se* or rule of reason analysis, but simply held the conspiracy illegal, without express consideration of market power or effects on competition. *Id.* Here, however, the alleged conspiracy (the Metropolitan Policy) does not involve the establishment of exclusive territories -- in fact, Bogan complains about a restriction against his transfer within a territory shared by six General Agents. Bog. 3(g) stmt. ¶ 34.

In light of the fact that the Metropolitan Policy cannot be considered either a classic group boycott, a horizontal price-fixing scheme or a horizontal territorial allocation that is illegal *per se*, we turn to an analysis of cases involving similar facts -- those involving arrangements that are both horizontal and vertical in nature -- in order to determine whether an agreement among General Agents that is policed by their principal, such as the Metropolitan Policy, constitutes a violation of the antitrust laws.

Many courts have held that sports organizations (outside of baseball) are capable of conspiring with their member clubs in violation of the antitrust laws and have analyzed these

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protected, but policies and level of service in the *entire industry, or at least the New York Metropolitan area.*

conspiracies under the rule of reason. *See, e.g., Mackey v. NFL*,[17] 543 F.2d 606, 618-19 (8th Cir.), *cert. dism'd*, 434 U.S. 801 (1977). In *Mackey*, the Eighth Circuit held that a NFL rule that required a club acquiring a free agent to compensate the agent's previous club constituted a group boycott properly analyzed under the rule of reason because of the special circumstance that the NFL possessed some characteristics of a joint venture and some characteristics of competition. *See also Chicago Prof'l Sports Lim. Partnership v. N.B.A.*, 961 F.2d 667, 673 (7th Cir.), *cert. denied*, 506 U.S. 954 (1992)(Rule of reason properly applied to NBA rule limiting television broadcasts since NBA is a joint venture); *Brenner v. World Boxing Council*[18], 675 F.2d 445, 454-55 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982)(declining to apply *per se* rule to World Boxing Council suspension practices).

The Second Circuit has found that an agreement by independent magazine solicitors to prevent its agents from switching agencies was an agreement "ostensibly directed at 'housecleaning' within the ranks of the signatory organizations themselves" and that "[b]ecause a harmful effect upon competition is not clearly apparent from the terms of these agreements," they were "distinguishable from those boycotts held illegal *per se.*" *Union Circulation Co. v. Fed. Ins. Comm'n*, 241 F.2d 652, 657 (2d Cir. 1957).

More recently, in *K.M.B. Warehouse v. Walker Mfg.*, 61

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[17]Recall from fn.9 that this case has been criticized by the Second Circuit, likely on the issue of labor law preemption of the antitrust laws.

[18]The Court noted that "absent a facial showing of anticompetitive purpose underlying the adopting or enforcement of a rule, the disciplinary activity of a sports organization must be evaluated under the *Denver Rockets* test or the rule of reason." *Id.* at 455 (referring to *Denver Rockets v. All-Pro Management Inc.*, 325 F. Supp. 1049, 1064-65 (C.D. Cal 1971)).

F.3d 123, 127 (2d Cir. 1995), the Second Circuit found a conspiracy between an auto parts manufacturer and some of its distributors to exclude an outside auto-parts distributor to be a vertical, non-price restriction governed by the rule of reason. The manufacturer, at the behest of some of its distributors, refused to honor a contract it had made with K.M.B. to allow K.M.B. to distribute its products. *Id.* at 126; *see also Bunch v. Artec Intern. Corp.*, 559 F. Supp. 961, 966 (S.D.N.Y. 1983)("[M]erely because a dealer's termination may contain elements of a horizontal restriction, it does not become a *per se* violation of the Sherman Act, thereby obviating the requirements that plaintiff's establish that defendants' conduct is manifestly anticompetitive.").

The Second Circuit has also recently stated that an arrangement that had both horizontal and vertical aspects definitely should be tested under the rule of reason and "possibly under the *per se* rule applied to group boycotts in *Klor's*, if the restraint of trade 'has no purpose except stifling competition.'" *Discon, Inc. v. Nynex*, 93 F.3d 1055, 1060-61 (2d Cir. 1996). There, plaintiff Discon accused NYNEX and MECo, (a corporation that acted as NYNEX's procurement agent), of conspiring to exclude Discon from providing "removal" services. (These removal services included salvaging and disposing of obsolete telephone central office equipment.) The court found that plaintiffs had not established a horizontal restraint because MECO did not itself provide removal services and thus did not compete with Discon or Nynex. *Id.* However, the Second Circuit stated that an agreement between two firms, even in a vertical relationship may constitute a horizontal restraint if it seeks to "disadvantage a direct competitor." It found that in Discon's case, no pro-competitive justification appeared on the face of the complaint for NYNEX's behavior in excluding Discon and thus concluded that a cause of action had been stated, leaving the decision as to

whether to apply the rule of reason or a *per se* analysis to the district court at trial. *Id.* ("*Per se* rule to be applied only if evidence shows that the practice had 'no purpose other than to stifle competition.'"; *see also Volvo N. Amer. v. Men's Int'l Prof. Tennis Council*, 857 F.2d 55, 72-73 (2d Cir. 1988)(Whether conduct alleged to be possibly horizontal market division, group boycott or concerted refusal to deal is to be analyzed under rule of reason or *per se* test is "matter for the district court to decide in due course.").

The transfer restrictions of the Metropolitan Policy at issue here may well have been promulgated with mixed motives, one of which was a desire on the part of the General Agents to preserve the *status quo* at NML, thereby stabilizing the amount of compensation each General Agent expected to receive. However, at the inter-company level, the Policy appears to have the substantial procompetitive justification of encouraging General Agents to better train their subordinate agents.[19] This enables each General Agent to compete more effectively for clients with other NML General Agents and with the agents of other companies. (*see* section II(C), *supra).* It also enables them to better compete with other General Agents for the hiring of new subordinate agents, who have an obvious interest in receiving the best training possible. Thus, it is not the type of practice that has "no purpose except stifling competition."[20] *Discon*, 93 F.3d at 1061-61; *see also Northern P.R. Co.*, 356

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[19]Bogan himself testifies in detail as to the importance and expense of training agents. *See, e.g.*, R. Bog. Aff. ¶ 16, ¶ 55 ("The recruiting, training and performance of Sales Agents determines 100 percent of management revenue.").

[20]This is a further reason that the Metropolitan policy cannot be considered a "group boycott." *Topco Chewing Gum, supra*, 641 F. Supp. at 1186, suggests that such group boycotts must have a "pernicious effect on competition and lack any redeeming virtue."

U.S. at 5 (In order to be illegal *per se*, a practice must be "so pernicious" as to "lack . . . any redeeming value."). Therefore, regardless of the precise label given to the conduct, (boycott, a horizontal price-restraint with vertical aspects, vertical non-price restraint with horizontal aspects and price effects, etc.), we believe a careful comparison of the facts of this case and of the precedents in the Second Circuit shows that it is properly analyzed under the rule of reason. Accordingly, consistent with the sports cases, *K.M.B. Warehouse*, and the Second Circuit's prescription that "expansion of the *per se* rule 'should be approached with great caution,'" *Copy-Data Sys., Inc. v. Toshiba Am.*, 663 F.2d 405, 411 (2d Cir. 1982), we next analyze the effects of the Metropolitan Policy under the rule of reason.

E. *Rule of Reason Analysis of the Competitive Effects*

According to the Second Circuit:

> Establishing a violation of the rule of reason involves three steps. "[P]laintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market . . . ." If the plaintiff succeeds, the burden shifts to the defendant to establish the "procompetitive 'redeeming virtues'" of the action. Should the defendant carry this burden, the plaintiff must then show that the same procompetitive effect could be achieved through alternative means that is less restrictive of competition.

K.M.B. Warehouse, 61 F.3d at 127 (citations omitted); *Capital Imaging*, 996 F.2d at 543; *Int'l Distrib. Centers v. Walsh Trucking*, 812 F.2d 786, 793 (2d Cir. 1987), *cert. denied*, 482 U.S. 915, (plaintiff must show anticompetitive effects of the

conspiracy outweigh the procompetitive.)[21]

1. *The Test for Proving Adverse Effect*

"The antitrust laws . . . were enacted for 'the protection of competition not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). Thus, a plaintiff must show more than that he was harmed by defendant's conduct or that there was an adverse effect on competition among different sellers of the same product. *K.M.B. Warehouse*, 61 F.3d at 127. Such intrabrand restrictions can "actually enhance market-wide competition by fostering vertical efficiency and maintaining the desired quality of a product." *Id.* The focus of the inquiry must be the relevant market as a whole, and any restriction of intrabrand competition must be balanced against any increases in interbrand competition. *Id.*; *see also Borger v. Yamaha Intern. Corp.*, 625 F.2d 390, 397

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[21]Bogan would have us apply the "Quick Look" approach to the rule of reason, arguing that "Because these are restraints by horizontal competitors, as Hodgkins admits, the 'Quick Look' approach requires Hodgkins to justify the restraint by proving that procompetitive effects outweigh anticompetitive effects and are the least restrictive available." Hdgk. Br. p. 34. To justify the application of the "Quick Look" approach, he quotes the Seventh Circuit in *Chicago Pro Sports, infra*, as stating that such an approach applies because "there was a 'naked restraint' of a horizontal nature because it was an agreement among competitors as to certain issues concerning how they would compete with each other." This quotation "cherry picks" a phrase from its context -- the "naked restraint" must be one on "*price* or *output*". *See, e.g., Chicago Pro Sports*, 961 F.2d at 674. As discussed above, the conspiracy alleged here does not constitute a price restriction in the relevant market -- that of the labor of agents industry-wide, or at least metropolitan-area-wide. Nor does it affect output. Bogan does not allege that it affects the number of policies sold or agents hired. The Metropolitan Policy merely prevents *transfers of agents between NML General Agencies.*

(2d Cir. 1980).

While Bogan has shown considerable personal harm from Hodgkins' and NML's conduct, he has not shown sufficient harm in the relevant market -- labor of insurance agents in the metropolitan area.[22] Bogan would apparently have us believe the relevant market is his services, or that of only NML agents. As *K.M.B.* illustrates, this is not the proper market for antitrust purposes.[23] *See also Balaklaw v. Lovell*, 14 F.3d 793, 798-99 (2d Cir. 1998)(No antitrust injury where anesthesiologist complained about exclusion from hospital holding exclusive contract with another association of doctors -- plaintiff had failed to show injury either to consumers (patients) or sellers (doctors) in the relevant markets. The relevant market for the doctors was the multi-state area in which the hospital recruited

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[22]Even though Bogan has since recontracted with Massachusetts Mutual and still apparently uses the same offices, he alleges that he lost a significant client base that did not transfer with him to Massachusetts Mutual as well as generous retirement benefits. *See* Bog. Aff. ¶¶ 12-13. We find these assertions credible, and thus sufficient to establish personal harm from his termination, although his subsequent contract with Massachusetts Mutual provides evidence that interbrand competition was increased by his termination.

[23]Even if NML agents were the proper market (which we do not believe), there is no evidence before this court that anyone other than Robert (and perhaps Scott) Bogan was prohibited from transferring. In fact, Scott Bogan concedes in his deposition that Stephen Gilberg had stated in a June 11th meeting that the Metropolitan Policy "would not be an inhibition . . . [to recontracting]" and that "*there have been transfers of agents previously between agencies*; and that it wasn't an issue. Nobody would be encumbered." S. Bog. Depo. p. 455 (emphasis added).

doctors.).[24] While Bogan has offered several affidavits of customers and agents stating that they prefer not to have either their own or their client's personal information provided to anyone besides Robert Bogan, (*see, e.g.*, James Cantalini Aff., Michael Flora Aff., Lawrence Green Aff., Al Woodall Aff., Eric Wagoner Aff., Donald Zinn Aff.), the Second Circuit has found such "isolated statements of preference are not a sufficient 'empirical demonstration concerning the [adverse] effect of the [defendants'] arrangement on price or quality.'" *K.M.B.*, 61 F.3d at 128. Thus, since Bogan has not demonstrated the requisite evidence of adverse effect in the relevant market, he has failed the rule of reason test as a matter of law.[25]

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[24]*Balaklaw* was actually decided on the basis of standing; the Second Circuit found that since plaintiff had not shown injury to competition in the relevant market, he had not demonstrated antitrust injury and had no standing. *Balaklaw*, 14 F.3d at 798-800. The court noted:

> For standing purposes, however, whether there was or was not a *per se* violation is irrelevant. Regardless of any substantive violation of the Sherman Act, sections 4 and 16 of the Clayton Act still require plaintiffs to establish that the defendants engaged in anticompetitive conduct that caused them an antitrust injury . . . Although the *per se* rule relieves plaintiff of the burden of demonstrating an anticompetitive effect, which is assumed, it does not excuse a plaintiff from showing that his injury was caused by the anticompetitive acts.

Id. (citations omitted.) Since we decide that for the same reasons, Bogan has failed the rule of reason test, we need not reach the standing issue.

[25]Bogan strenuously urges that this situation is analogous to that of a professional sports player who is not allowed by the league to transfer between teams. While these cases have numerous similarities, the one fatal dissimilarity Bogan fails to perceive is that here, there are other insurance agencies for whom he could work. In fact, Bogan is apparently working for one now. Hdgk. Br. p. 7. When the NFL

2. *The Tests for Procompetitive Effect and Plaintiff's Obligation to Prove Less Restrictive Means*

Since we have held as a matter of law that Bogan has failed to satisfy the first prong of the rule of reason analysis, we need not reach the other elements. We note in passing, however, that Hodgkins has offered a procompetitive justification -- the encouragement of training -- that was supported by Bogan's own affidavits. *See* fn.19, *supra*. Moreover, Bogan has not offered a suggested any less restrictive means by which NML and the General Agents could insure that the District and Sales Agents receive adequate training.

III. THE STATE CLAIMS

As previously mentioned, this case presents a federal anti-trust claim together with fifteen pendent state claims which Bogan urges us to retain under the doctrine of supplemental jurisdiction, 28 U.S.C. § 1367. The exercise of pendent (or supplemental) jurisdiction is left to the discretion of the district court. *Purgess v. Sharrock*, 33 F.3d 134, 138-139 (2d Cir. 1994). In exercising its discretion, the district court is permitted to weigh several factors, including considerations of judicial economy, convenience, and fairness to litigants. *Id.* (state claims retained where federal claim was dismissed at the close of the evidence.)

First, we note that the pendent state claims are the subject of a pending action in Supreme Court, Westchester County. If we retain no part of this case and allow it to proceed in the state court, judicial economy and convenience of the parties would not be substantially disserved. True, this Court has spent considerable time familiarizing itself with the facts of the case,

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forbids a player to transfer without compensation of his prior team, *see Mackey, supra*, he is effectively prevented from playing elsewhere.

but we have done so mainly with an eye towards the federal claims at issue. We have not probed in depth the factual basis for the state claims such as fraud and tortious interference with contract, and would be required to spend considerable time and effort to do so. Nor have we considered the lengthy submissions regarding Plaintiffs' claims against NML. Moreover, the state court is undoubtedly much more familiar with the state law principles applicable to all of these claims.

This Court, with the generous help of Magistrate Judge Fox, has expended significant resources to oversee the discovery process. This effort will not have been in vain should we dismiss the state claims, but will surely work to save the State Court and the parties considerable time and expense in their continued prosecution of this suit. The extensive discovery already undertaken should not have to be repeated. While Bogan urges us that he would be prejudiced by the 16-month delay in obtaining a trial date in state court, we do not consider this delay a significant factor. Our current trial calendar would not permit trial of the case for approximately ten months, even if the parties were ready for an immediate trial, which they are not. Moreover, there are pending motions by both defendants for summary judgment on all fifteen claims, another factor that could cause further substantial delay of the trial. Thus the time required to reach trial in the state court is not a significant factor in our decision whether to retain jurisdiction.

In light of the above factors, we decline to exercise supplemental jurisdiction over the Bogans' state law claims.

CONCLUSION

Although we conclude that an agreement among an insurance company's General Agents to restrict the transfer of their subordinate agents does not constitute the business of insurance under the McCarran-Ferguson Act and that General Agents can conspire with each other, and thus that the conspiracy alleged by Bogan is not exempt from antitrust scrutiny, we conclude

that the activity of Defendant Hodgkins alleged in the complaint does not constitute an antitrust violation. Because the alleged conspiracy appears to have at least some vertical aspects, to have occurred in a setting that requires at least some horizontal cooperation, and not to have involved naked price or output restraints, it is properly analyzed under the rule of reason. Since Bogan has failed to show sufficient adverse effect on the relevant market -- the labor of subordinate insurance agents in the New York Metropolitan area -- he has failed to satisfy the rule of reason test, and his antitrust claim fails as a matter of law. Finally, since neither judicial economy, convenience nor fairness to the litigants would be particularly served by our retaining supplemental jurisdiction over the fifteen state claims, we decline to do so. Thus, we grant defendants' motion for summary judgment on the antitrust claim, and dismiss the remaining fifteen state claims for resolution in the pending state court case.

Dated: February 5, 1997
White Plains, New York

s/William C. Conner
Senior United States District Judge

91 Civ. 2221 (WCC)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT M. BOGAN AND SCOTT M. BOGAN,
Plaintiffs,

-against-

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY AND AUSTIN E. HODGKINS, JR.,
Defendants.

ORDER

CONNER, Senior D.J.:

Upon due consideration of plaintiffs' motion for reconsideration of this Court's Opinion and Order dated February 5, 1997 and the judgment entered February 6, 1997, together with plaintiffs' motion to direct entry of a final judgment on any dismissed claims, together with defendant', opposition thereto, it is hereby

ORDERED, that plaintiffs' motion for reconsideration is granted; it is further

ORDERED, that upon this Court's reconsideration of its Opinion and Order dated February 5, 1997 to the extent it dismissed plaintiffs' antitrust claims is adhered to, however, as to the plaintiffs' remaining state law claims it is vacated to the extent that the Court's decision on its exercise of pendent jurisdiction is reserved until such time that the Second Circuit has ruled on any appeal by plaintiffs on the dismissal of the antitrust claims or plaintiffs' time to perfect such appeal expires; it is further

ORDERED, that this Court's February 6, 1997 judgment

is vacated; it is further

ORDERED, that defendant Hodgkins' motion for summary judgment on plaintiffs' antitrust claims, the first and second causes of actions in the First Amended Complaint is granted and a decision of the balance of defendant Hodgkins' motion and the motion of defendant Northwestern Mutual Life Insurance Company on the remaining claims is reserved pending a decision on the appeal to the Second Circuit by plaintiffs or the expiration of plaintiffs' time to perfect same; it is further

DETERMINED, that judicial economy would be best served by immediate appeal of the dismissal of the antitrust claims, in order to avoid the possibility of having to hold multiple lengthy trials based upon the same underlying facts and involving essentially the same witnesses, where such trials would differ only in the legal theories of recovery; it is further

DETERMINED, that there is therefore no reason to delay entry of final judgment as to the dismissal of plaintiffs' antitrust claims; thus, it is further

ORDERED, that pursuant to Rule 54(b) of Fed. R. Civ. P., the clerk is directed to enter such final judgment forthwith; and it is further

ORDERED, that the Court's dismissal of the antitrust claims is a final disposition of these claims in a multiclaim action and that the antitrust claims are severable from the remaining claims in plaintiffs' First Amended Complaint.

SO ORDERED.

Dated: White Plains, New York
September 10, 1997

s/Hon. William C. Conner
SENIOR UNITED STATES DISTRICT JUDGE

91 Civ. 2221 (WCC)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT M. BOGAN AND SCOTT M. BOGAN,
Plaintiffs,

-against-

Filed U.S.District Court
S.D. of N.Y.
Sep. 12, 1997

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY AND AUSTIN E. HODGKINS, JR.,
Defendants.

PARTIAL JUDGMENT

Plaintiff having moved for reconsideration of this Court's Opinion and Order dated February 5, 1997 and the judgment entered February 6, 1997, together with plaintifs' motion to direct entry of a final judgment on any dismissed claims, together with defendant' opposition thereto and the said motions having come before the Honorable William C. Conner, United States District Judge and the Court thereafter on September 10, 1997, having handed down its order, granting the plaintiff's motion for reconsideration of its Opinion and Order dated February 5, 1997 to the extent it dismissed plaintiffs' antitrust claims is adhered to, however, as to the plaintiffs' remaining state law claims it is vacated to the extent that the Court's decision on its exercise of pendent jurisdiction is reserved until such time that the Second Circuit has ruled on any appeal by plaintiffs on the dismissal of the antitrust claims or plaintiffs' time to perfect such appeal expires, it is further ordered, that the Court's February 6, 1997 judgment is vacated, it is,

ORDERED, ADJUDGED AND DECREED: That pursuant to Rule 54(b) of Fed. R. Civ. P., there being no reason

to delay entry of final judgment as to the dismissal of plaintiffs' antitrust claims in plaintifs' First Amended Complaint.

DATED: White Plains, N.Y.
September 12, 1997

s/James M. Parkison
Clerk
E.O.D. 9-12-97

Supreme Court, U.S.
FILED
AUG 13 1999
OFFICE OF THE CLERK

(2)

No. 99-89

In the

Supreme Court of the United States

ROBERT BOGAN AND SCOTT BOGAN
Petitioners,

v.

AUSTIN E. HODGKINS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE STATES OF CONNECTICUT, IOWA, MICHIGAN, NEVADA, NEW YORK, UTAH, VERMONT AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Elliot Spitzer
Attorney General
Preeta D. Bansal*
Solicitor General
Harry First
Assistant Attorney General
Chief, Antitrust Bureau
Robert L. Hubbard
Assistant Attorney General
120 Broadway
New York, NY 10271

Frankie Sue Del Papa
Attorney General
Kathleen Marshall
Senior Deputy Attorney
General, Antitrust Unit
Old Supreme Court Building
100 North Carson Street
Carson City, NV 89701

* *Counsel of Record*

[Additional counsel on inside cover]

13pp

RICHARD BLUMENTHAL
Attorney General of Connecticut
55 Elm Street
Hartford, CT 06141

ROBERT RIGSBY
Interim Corporation Counsel of
the District of Columbia
441 Fourth Street, N.W.
Washington, D.C. 20001

THOMAS J. MILLER
Attorney General of Iowa
Hoover State Office Building
Des Moines, IA 50319

JENNIFER M. GRANHOLM
Attorney General of Michigan
Post Office Box 30212
525 West Ottawa Street
Lansing, MI 48909-0212

JAN GRAHAM
Attorney General of Utah
160 East 300 South
Salt Lake City, UT 84111

WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, VT 05609-1001

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INTRODUCTION

The States of New York, Nevada, Connecticut, Iowa, Michigan, Utah, Vermont and the District of Columbia respectfully submit this brief as amici curiae in support of petitioners' request that a writ of *certiorari* be issued to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered February 2, 1999. Pet. App. 1a. The decision for which certiorari is sought conflicts with this Court's decisions and the decisions of other circuits in its construction of *per se* rules under section 1 of the Sherman Act, 15 U.S.C. § 1.

INTEREST OF THE AMICI CURIAE

The amici states, which include each of the states in the Second Circuit, have a vital interest in the antitrust laws and in preserving *per se* treatment of horizontal restraints of trade. The Attorneys General are the chief law officers of the amici states and are charged with the responsibility of enforcing the antitrust laws in their respective states. In their capacity as *parens patriae*, they are authorized to bring federal antitrust actions on behalf of the citizens of their states. The Attorneys General also represent their states and political subdivisions in federal antitrust actions for damages and injunctive relief and are the primary public enforcers of state antitrust laws, which are often interpreted in conformity with federal law. The states play a major role in antitrust enforcement and have a substantial interest in ensuring that the antitrust laws are interpreted in harmony with antitrust policy and this Court's decisions.

SUMMARY OF ARGUMENT

The Second Circuit erroneously held that a horizontal agreement among independent economic actors on how they will compete in providing a product or service to the public is not *per se* illegal. The challenged restraint should have been declared *per se* illegal. The *per se* rule applies to "intrabrand" restraints among horizontal competitors. A *per*

se claim does ***not*** require proof of market power. The harmful effect of an agreement to not compete for subagents merits *per se* treatment because the harmful effect ***is*** "clearly apparent." Pet. App. 12a.

The Court of Appeals found that neither the *per se* rule nor the abbreviated or "quick look" rule of reason analysis applied to the horizontal restraint. *Id.* The Court of Appeals substantially restricted the scope of the *per se* rule, and if left uncorrected, that construction will pose a threat to proper enforcement of the antitrust laws. Alternatively, the Court of Appeals' cursory disregard for the application of the "quick look" analysis directly contradicts this Court's recent decision in *California Dental Association v. Federal Trade Commission*, _ U.S. _, 119 S. Ct. 1604 (1999).

Therefore, the amici states request that the Court grant *certiorari* and summarily reverse so as to reaffirm that the *per se* rule applies to horizontal allocation agreements. In the alternative, the amici states request that the Court vacate and remand in light of this Court's opinion in *California Dental.*

ARGUMENT

I. THE COURT OF APPEALS' EMASCULATION OF THE *PER SE* RULE SHOULD BE SUMMARILY REVERSED

Petitioners are a district agent and a sales agent who were terminated by one of the six independent general agents in the New York City metropolitan area for Northwestern Mutual Life Insurance Co. The six general agents compete in the New York City metropolitan region and allegedly agreed among themselves not to recruit or hire each others' existing district or sales agents (collectively "subagents") without the consent of the subagent's general agent (the "agreement"). Petitioners, plaintiffs below, alleged that they were harmed

because of the enforcement of the agreement by respondent, petitioners' general agent.

The nature of the restraint at issue in the decision below cannot be dismissed as a factual dispute. The court below reviewed a grant of summary judgment to defendants, and thus resolved all ambiguities and potential factual inferences in plaintiffs' favor. One of the ambiguities resolved in plaintiffs' favor as a result of the case's procedural context was the parties' dispute as to whether the agreement was horizontal or vertical. The court analyzed the challenged agreement as a horizontal restraint. Pet. App. 10a.

After characterizing the agreement as horizontal, the court turned to what framework applied. First, the court held that an agreement among directly competing general agents on how they would treat subagents was a "transfer restriction policy" or a "no-switching" agreement, which it held was never *per se* illegal. Pet. App. 15a. Next, the court considered the agreement subject to a rule of reason analysis because it was an "intrafirm" agreement among general agents of one company, instead of an "interfirm" agreement among general agents of different companies. Pet. App. 14a. Finally, the court held that a horizontal agreement among direct competitors to not compete for subagents does not merit *per se* treatment because the harmful effect is "not clearly apparent." Pet. App. 15a.

The Court of Appeals made three distinct errors in analyzing how and whether the *per se* rule applies to the agreement. Each erroneous decision led the Court of Appeals toward a further error until it held that the *per se* rule requires proof of the very elements that the rule was meant to avoid.

First, the Court of Appeals in a single paragraph summarily rejected applying all *per se* theories, except "group boycotts," to the agreement. Pet. App. 13a. The court's facile rejection of that characterization was as follows:

> The [petitioners] suggest that the Agreement may be a supplier allocation, but the facts do not bear this interpretation; the Agreement permits transfers, and experienced NML agents do not comprise the entire set of suppliers of their services. Thus, while the Agreement may constrain General Agents to some degree, it does not allocate the market for agents to any meaningful degree.

Id.

The court below failed to construe that the agreement was a restraint among direct competitors about how those competitors would treat a key input in their industry: the experienced subagents they used. The agreement among general agents prevented transfers of experienced subagents among themselves. Thus, at a minimum the general agents agreed not to compete for subagents and to allocate those subagents to whichever general agent currently used the subagents.

Such a horizontal allocation agreement is a naked restraint to which the *per se* rule applies. *Palmer v. BRG, Inc.*, 498 U.S. 46 (1990) (per curiam). Such a restraint need not eliminate all competition to be *per se* illegal. As phrased by this Court in *Palmer*:

> The Court of Appeals erred when [it] assumed that an allocation of markets or submarkets by competitors is not unlawful unless the market in which the two previously competed is divided between them. . . . [A]greements are anticompetitive regardless of whether the parties split a market with which both do business or whether they merely reserve one market for one and another for the other.

Id. at 49-50.

The other Courts of Appeals appropriately apply the *per se* rule to this type of restraint. *Hammes v. AAMCO Transmission, Inc.*, 33 F.3d 774, 782-83 (7th Cir. 1994) (customer allocation agreement among franchisees is *per se* illegal); *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) (horizontal customer allocation *per se* illegal); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990) (horizontal customer allocation agreement); *United States v. Cooperative Theatres*, 845 F.2d 1367, 1373 (6th Cir. 1988) (customer allocation scheme); *Service Merchandise Co. v. Boyd Corp.*, 722 F.2d 945, 950 (1st Cir. 1983) (horizontal concerted refusal to deal); *Gainesville Utils. Dep't v. Florida Power & Light Co.*, 573 F.2d 292, 300 (5th Cir.) (horizontal market division), *cert. denied*, 439 U.S. 966 (1978); *American Motor Inns v. Holiday Inns*, 521 F.2d 1230, 1242 (3d Cir. 1975) (horizontal territorial allocation). Labelling a horizontal allocation agreement a "no-switching" agreement, Pet. App. 15a, does not transform a *per se* case into a rule of reason case. *United States v. Capitol Serv.*, 756 F.2d 502 (7th Cir.) (motion picture "split" agreement among horizontal competitors is *per se* illegal), *cert. denied*, 474 U.S. 945 (1985).

The second error of the Court of Appeals was to hold that the agreement was an "*intra*firm" agreement to which the rule of reason applied. The court held that the agreement among the general agents was "far from" the ambit of *per se* analysis because it is "akin to an *intra*firm agreement, one between general agents of the same company to restrain trade only in experienced [subagents] of that company." Pet. App. 14a.

This holding confuses analysis of horizontal and vertical restraints and is inconsistent with controlling precedent of this Court. For example, in *United States v. Topco Associates*, 405 U.S. 596 (1972), this Court reviewed a determination by a district court that refused to apply the *per se* rule to territorial and customer restrictions among horizontal competitors of the Topco brand. The district court reasoned

that territorial and customer restrictions, although eliminating intrabrand competition in Topco products, were reasonable because they promoted and enhanced interbrand competition with national supermarket chains. *United States v. Topco Associates*, 319 F. Supp. 1031,1038 (N.D. Ill. 1970), *rev'd* 405 U.S. 596 (1972). This Court rejected applying the rule of reason, recognizing that "[o]ne of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition." 405 U.S. at 608.

Indeed, many leading cases from this Court in this area concern "*intra*firm" restraints. An agreement among the distributors of General Motors cars was held to be a *per se* illegal restraint, even though the distributors restrained only *intra*brand competition, that is competition for General Motors cars. *United States v. General Motors Corp.*, 384 U.S. 127 (1966). Similarly, this Court applied the *per se* rule to restraints among the companies that manufacture Sealy brand mattresses, *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), which is what the Second Circuit labelled an "*intra*firm" restraint to which only the rule of reason applied.

Furthermore, by denying *per se* treatment unless a harmful effect upon competition can be shown, the Court of Appeals wrongfully added another element of proof to a *per se* analysis. Under the *per se* rule, restraints on competition are presumed unreasonable without inquiry into anticompetitive effects. *Northern Pacific Railway v. United States*, 356 U.S. 1 (1958). As explained by Professor Areeda, "In fullest flower, a per se rule condemns conduct without proof of power, effect, or purpose and without hearing claims of legitimate objectives." 7 P. Areeda, Antitrust Law ¶ 1509, at 409 (1986). To require such proof as the Court of Appeals did here would eliminate the very benefits of a *per se* rule.

Most importantly, the Court of Appeals concluded that "it is an element of a *per se* case to describe the relevant market" (citing monopolization cases to support its view). Pet. App. 14a. It is clear, however, that under a *per se* analysis one need not define "a market, [show] market shares, or [indicate] any actual or likely impact." 7 P. Areeda, Antitrust Law ¶ 1515a, at 415 (1986).

Thus, the Court of Appeals held that to obtain *per se* treatment for a horizontal agreement among competitors, to restrict competition for a necessary input (experienced subagents), which agreement the court characterized as a group boycott, the plaintiff must first prove a relevant market and harmful competitive effects. Such an erroneous construction of the *per se* rule undercuts its usefulness and "is flatly inconsistent with the clear course of our antitrust jurisprudence." *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 436 (1990) (holding boycotts *per se* unlawful without need to prove market power). Accordingly, we urge the Court to grant certiorari and summarily reverse the Court of Appeals' holding on this point.

II. THE COURT OF APPEALS' SUMMARY DISMISSAL OF THE "QUICK LOOK" OR ABBREVIATED RULE OF REASON WAS INCORRECT

For the reasons explained above, the amici states believe that the *per se* rule applies to the agreement discussed by the Second Circuit. Even if this Court finds that the court below appropriately held that the *per se* rule did not apply, however, something less than a full-blown rule of reason analysis was appropriate.

The Court of Appeals, prior to dismissing application of the *per se* rule, also dismissed application of the "quick look" rule in a footnote. Pet. App. 12a. The Court of Appeals held that because respondent "countered [with] sound allegations"

of a procompetitive rationale to petitioners' allegations of a naked restraint of trade, the analysis should proceed directly to the rule of reason. *Id.*

Although a "quick look" analysis can "be applied in the twinkling of an eye," the Court of Appeals should have at least blinked. *NCAA v. Bd. of Regents,* 468 U.S. 85, 109 n.39 (1984) (*quoting* P. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981)). Furthermore, in light of this Court's recent decision in *California Dental*, the Court of Appeals should have inquired into the logic of the agreement and into respondent's alleged procompetitive justification to determine whether on the whole the primary tendency of the agreement was anticompetitive. _ U.S. at _, 119 S. Ct. at 1613.

The agreement at issue in this case is a naked restraint on price and output. By agreeing not to compete for experienced subagents, the general agents restricted all forms of competition for such subagents. Having identified a horizontal restraint and having decided that such activity did not meet the criterion for the *per se* rule, the Court of Appeals next determined that respondent's unspecified "sound allegations" of procompetitive justification required rule of reason analysis. Pet. App. 12a. Yet, the agreement prevented subagents from offering better services to their customers by transferring or threatening to transfer to another general agent. Moreover, the agreement enabled general agents to restrict the educational and business opportunities of subagents. Once with a general agent, subagents have little choice but to remain with that general agent. Indeed, under the agreement, general agents would likely have little incentive to provide an experienced subagent anything beyond the basic compensation package provided to a new subagent.

In *California Dental*, this Court concluded that where a horizontal restraint "fails to present a situation in which the likelihood of anticompetitive effects is comparably obvious"

a "more extended examination of the factual underpinnings" is required, without necessarily embarking on full-blown rule of reason analysis. _ U.S. at _, 119 S. Ct. at 1613. Here, the Court of Appeals stated that the anticompetitive effects of the agreement were not obvious. Pet. App 15a. But the Court of Appeals then concluded, without further analysis, that because respondent alleged a competitive justification, the case must proceed to a full blown rule of reason or be dismissed. Pet. App. 12a. The Court of Appeals erred in holding that mere "allegations" are sufficient to end the inquiry. To be consistent with this Court's decision in *California Dental*, the Court of Appeals' analysis "required a more extended examination of the possible factual underpinnings" without the necessity for the fullest market analysis. _ U.S. at _, 119 S. Ct. at 1617. The Court of Appeals should have scrutinized the circumstances, details, and logic of both the restraint and respondent's justification for the restraint to determine with confidence whether, on the whole, the "principal tendency of [the restriction]" was anticompetitive. *Id.* Having failed to do so, the Court of Appeals' judgment should be vacated and remanded for fuller consideration of the issue in light of *California Dental*.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

Elliot Spitzer
Attorney General
Preeta D. Bansal*
Solicitor General
Harry First
Assistant Attorney General
Chief, Antitrust Bureau
Robert L. Hubbard
Assistant Attorney General
120 Broadway
New York, NY 10271

Frankie Sue Del Papa
Attorney General
Kathleen Marshall
Senior Deputy Attorney
General, Antitrust Unit
Old Supreme Court Building
100 North Carson Street
Carson City, NV 89701

* *Counsel of Record*

Counsel for *Amici* States

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No. 99-89

In the Supreme Court of the United States

ROBERT BOGAN AND SCOTT BOGAN,

Petitioners,

v.

AUSTIN E. HODGKINS, JR.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

TIMOTHY P. COON
Bleakley Platt & Schmidt
1 North Lexington Avenue
P.O. Box 5056
White Plains, N.Y. 10602
(914) 949-2700

ROY T. ENGLERT, JR.
Counsel of Record
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

QUESTIONS PRESENTED

Respondent, a general agent of the Northwestern Mutual Life Insurance Company (NML), allegedly agreed with other NML general agents not to hire away each other's subagents without prior permission, thus protecting the NML general agents' investments in the subagents' training, and in turn promoting interbrand competition in the overall market for insurance. Petitioners, two NML subagents, conceded that they would lose their antitrust suit against respondent under the rule of reason.

The following questions are presented:

1. Did the court of appeals correctly refuse to expand the limited universe of activity deemed illegal *per se* and thus correctly uphold this procompetitive policy under the rule of reason?

2. Given the policy's procompetitive aspects, did the court correctly hold that the policy was legal even under the "quick look" rule of reason?

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

This is a request by petitioners that the Court create a new category of conduct deemed illegal *per se* under the Sherman Act, 15 U.S.C. § 1 — even though the conduct at issue here not only is not the sort of "manifestly anticompetitive" conduct for which *per se* treatment may be appropriate (*Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 723 (1977)), but instead actually *fosters* competition among sellers of insurance. Rejecting petitioners' request, the Second Circuit held that the challenged conduct was properly assessed under the rule of reason, and it affirmed summary judgment for respondent given petitioners' concession that under the rule of reason they would lose. Despite petitioners' (and amici's) rote incantations of the standards of this Court's Rule 10, the Second Circuit's decision was correct on the merits and conflicts with no decision of this Court or of any other court of appeals. The petition should be denied.

STATEMENT

Petitioners devote most of their statement to spinning the facts of what the district court called "[petitioners'] rather confusing claim" (Pet. App. 29a). Most of petitioners' statement is simply irrelevant to the petition, however, not to mention at odds with the facts found undisputed by the district court in entering summary judgment for respondent. In any event, the relevant facts are set out fully in the opinion of the court of appeals affirming the judgment for respondent (Pet. App. 1a-17a), and respondent adds only the following corrections to petitioners' statement.

First, the alleged "no-switching agreement" at issue here is not, as petitioners suggest (at 3-5), solely — or even mostly — horizontal in nature. The court of appeals held that for the purposes of deciding the appeal it would treat the alleged agreement as if it were entirely horizontal, but only because it held that petitioners would lose no matter how the policy was characterized. Pet. App. 10a. In fact, respondent

introduced substantial proof that the policy at issue was vertical in nature, as the district court held. See Pet. App. 41a-46a (detailing what the court viewed as the "strong vertical aspects to the alleged combination" (at 45a)). For example, the written policy, which was drafted by the Northwestern Mutual Life Insurance Company (NML), states in its first paragraph:

> Our first objective is to operate in the best interests of the Company and its General Agency system. * * * [T]he Company and the General Agents have to protect investments of time, energy and money in the recruitment, training, development and support of agents and in the General Agency system. Therefore, we need to operate within certain guidelines to provide a modicum of structure and some basic "rules of the road" with reference to transfers, especially in areas were several Agents operate within the same territory.

Pet. App. 28a n.6. As one NML officer explained in an uncontradicted affidavit, it had long been NML's policy to refuse the transfer of subagents between general agencies in shared territories (such as the New York metropolitan region). To the extent that general agents try to violate the policy, NML enforces it. In this very case, for instance, petitioner Robert Bogan signed a contract with another general agent after being terminated him for cause, but NML refused to approve the new contract. See Pet. App. 43a. Thus, nonparty NML — not respondent Hodgkins — caused petitioner not to be contracted with Hodgkins' alleged competitor.

Second, petitioners' "history of the litigation" (Pet. 11) is both inaccurate and incomplete. The Second Circuit obviously did not "reverse" the district court's decision (*ibid.*). The court of appeals affirmed the district court's grant of summary judgment to respondent (Pet. App. 17a), holding that there was an issue of fact as to whether the alleged agreement is vertical or horizontal, but that petition-

ers could not prevail even if it were horizontal alone. And petitioners' nine-year crusade did not begin with this lawsuit and has not ended with this petition. Petitioners sued respondent and NML in New York state court in 1990 (see Pet. App. 9a n.5), and filed yet another state court action (after the first was dismissed), as well as another action in the Southern District of New York, just days after they filed this petition.

REASONS FOR DENYING THE PETITION

The Second Circuit correctly refused in this case to expand the universe of conduct deemed illegal *per se* under the antitrust laws and correctly held that the conduct that petitioners challenged did not fit any of the limited categories to which the *per se* rule applies. The court's decision, moreover, is consistent with all other decisions of courts of appeals addressing no-switching agreements and does not conflict with any decisions of this Court. The court also correctly applied the decisions of this Court in rejecting the application of the "quick look" rule of reason. Petitioners' case, finally, poses other problems. As a matter of law, petitioners likely could not prove that respondent and his fellow general agents could have engaged in the concerted behavior proscribed by section 1 of the Sherman Act, because the general agents are all engaged in a common enterprise; and, as the Second Circuit noted, petitioners probably lack standing to sue.

1.a. Although antitrust law provides three different modes of analyzing the competitive effects of an agreement (*per se* rule, "quick look" rule of reason, and full rule of reason), each mode has the same object: distinguishing agreements that harm competition from those that do not. See 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶¶ 1508, 1511 (1986); *NCAA* v. *Board of Regents*, 468 U.S. 85, 104 n.26 (1984) ("there is often no bright line separating *per se* from Rule of Reason analysis"). Contrary to petitioners' sugges-

tion, the modes are not alternative tests allowing a plaintiff three chances to prevail, but rather varying ways for a court to approach the single question that is at the heart of all antitrust cases. Thus, this Court recently reaffirmed that "*[p]er se* treatment is appropriate '[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that *the rule of reason will condemn it.*'" *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997) (quoting *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 344 (1982)) (emphasis added). Petitioners here are in the anomalous position of *conceding* that the rule of reason will *not* condemn the policy at issue in this case, yet insisting that it can be fitted within the *per se* rule. See Pet. App. 12a n.6. A unanimous panel of the Second Circuit (Judges Walker, Calabresi, and Restani) easily saw through that exercise in exalting form over substance.

The court of appeals thus rightly rejected petitioners' argument that it should add another category of conduct to those deemed illegal *per se*. This Court limits the application of the *per se* rule of illegality to "conduct that is manifestly anticompetitive, that is, conduct that would *always or almost always* tend to restrict competition and decrease output." *Business Electronics* v. *Sharp Electronics*, 485 U.S. at 723 (citations and internal quotation marks omitted; emphasis added). And because experience sometimes shows that the presumption of illegality was misplaced, this Court has not hesitated to reclassify as potentially procompetitive certain conduct once held illegal *per se*. *E.g.*, *State Oil* v. *Khan*, *supra* (holding vertical maximum price fixing subject to the rule of reason and overruling *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968)); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (holding vertical non-price restrictions subject to the rule of reason and overruling *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)). The point, in short, is that the rule of reason is the rule, and *per se* illegality is the exception to the rule. "Rule-of-reason

guides the inquiry [under the Sherman Act] *unless* the challenged action falls into the category of agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable." *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985) (citation and internal quotation marks omitted; emphasis added). Thus, the Court has repeatedly "expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic import of certain practices is not immediately obvious." *Khan*, 522 U.S. at 10 (citation and internal quotation marks omitted); see *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 458-459 (1986) (warning against the "indiscriminate[ ]" expansion of types of restraints classified as *per se* illegal group boycotts).

Examining the alleged no-switching agreement at issue here, the Second Circuit decided that the policy is not the type of restraint that is so "manifestly anticompetitive" as to warrant an exception to the application of the rule of reason and instead deserve condemnation *per se*. Pet. App. 11a (quoting *GTE Sylvania*, 433 U.S. at 49-50). The court's conclusion was indisputably correct. The policy obviously does not divide territories, since all general agents are free to compete anywhere in the New York metropolitan area, or anywhere else. Pet. App. 13a ("the record reveals no geographic * * * division"), 48a ("the alleged conspiracy * * * does not involve the establishment of exclusive territories"). The policy just as obviously does not divide the market of buyers of insurance. Pet. App. 13a. Nor does it "allocate the market for agents to any meaningful extent" (*ibid.*), given that it does permit subagents to transfer and that the market of potential subagents is not limited to subagents already selling on behalf of NML.

Having held that the alleged no-switching agreement is not like a territorial or other market allocation, the court of

appeals then rightly held that the policy does not constitute a *per se* illegal "group boycott." The court noted that not all activity that might be called a "group boycott" necessarily comes under the *per se* rule. *Ibid.* (citing *Northwest Wholesale Stationers*, 472 U.S. at 298); see *NYNEX Corp.* v. *Discon, Inc.*, 119 S. Ct. 493, 497 (1999). Rather, the Second Circuit held, the "classic" type of group boycott deemed illegal *per se* is "interfirm," or interbrand, "'limited to cases in which firms with market power boycott suppliers or customers to discourage them from doing business with a competitor.'" Pet. App. 12a (quoting *Indiana Fed'n of Dentists*, 476 U.S. at 458), 14a; see *NYNEX* v. *Discon*, 119 S. Ct. at 498 ("precedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors"). As this Court noted just recently, "the primary purpose of the antitrust laws is to protect interbrand competition." *Khan*, 522 U.S. at 15; see also *GTE Sylvania*, 433 U.S. at 52 n.19 (calling interbrand competition "the primary concern of antitrust law"). Here, however, petitioners had accused respondent of restraining competition within a single firm or brand — a firm (NML) with only 4% of the New York insurance market (Pet App. 42a ("Nowhere do[] [petitioners] * * * suggest that NML has market power in the insurance market.")). Because the alleged agreement does not restrain competition among different firms or brands — it promotes such competition, in fact, since other insurance agencies can easily hire NML agents (as the Massachusetts Mutual Life Insurance Company hired petitioners, Pet. App. 16a) — the court of appeals held that the policy was properly analyzed under the rule of reason. Under this Court's teachings, that conclusion was correct.

b. The Second Circuit's decision not to apply a *per se* rule does not conflict with the decisions of any other courts of appeals. As far as we know, no other court of appeals has ever directly addressed the issue whether intrabrand no-switching agreements are subject to rule-of-reason analysis.

Nor have petitioners cited any cases in support of a conflict on the issue. Intrabrand agreements aside, the only courts of appeals that have considered *inter*brand no-switching agreements have concluded that the latter are not illegal *per se*. *Nichols* v. *Spencer Int'l Press, Inc.*, 371 F.2d 332 (7th Cir. 1967); *Union Circulation Co.* v. *FTC*, 241 F.2d 652 (2d Cir. 1957); see also *Consultants & Designers, Inc.* v. *Butler Serv. Group, Inc.*, 720 F.2d 1553, 1560 (11th Cir. 1983) (calling "bizarre and frivolous" the argument that a no-switching restrictive covenant in an employment agreement, honored by an employer and its competitor, might be illegal *per se*). If interbrand no-switching agreements are assessed under the rule of reason (even though they may restrain interbrand competition), it follows *a fortiori* that *intra*brand agreements must be assessed under the rule of reason as well (given that they promote interbrand competition). No court of appeals has held otherwise, which is another reason that review by this Court is unwarranted.

c. In light of this Court's skepticism toward the expansion of the presumption of *per se* illegality, it is not surprising (as a matter of strategy) that neither petitioners nor amici seriously suggest that the Court should now add a new class of conduct to the limited number it condemns *per se*. Having no plausible argument that experience demonstrates that intrabrand no-switching agreements are inevitably anticompetitive — and facing petitioners' concession that in fact the alleged agreement here was effectively *pro*competitive, since petitioners would lose under the rule of reason — petitioners and amici argue that the alleged agreement here is like ones that have already been held illegal *per se* under this Court's prior decisions. These labored attempts at relabeling are unpersuasive.

Petitioners first call the policy a "refusal to deal," or group boycott. Pet. 13. That gets petitioners nowhere. As we have explained, the Second Circuit rightly held that the *per se* rule does not apply to all concerted refusals to deal.

Pet. App. 13a. "[N]ot all concerted refusals to deal should be accorded per se treatment * * * because not all concerted refusals to deal are predominantly anticompetitive." *Northwest Wholesale Stationers*, 472 U.S. at 297-298 (footnote omitted). As the Second Circuit held, the policy challenged here (a) is intrabrand, not interbrand; and (b) has important procompetitive aspects. Pet. App. 12a n.6, 14a. It thus differs in critical respects from the boycotts that have been deemed illegal *per se* in other cases and was thus properly analyzed under the rule of reason.

Petitioners also claim that the policy "allocat[es] a market" and "split[s] the same geographic market." Pet. 14. The policy does no such thing, as the Second Circuit held, Pet. App. 13a; general agents may and do compete with one another in any market they choose. Petitioners and amici can thus find no support in *Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam) (see Pet. 14-15; Amici Br. 4), and the laundry list of cases that apply the same unexceptional rule (see Pet. 16; Amici Br. 5), that an agreement to divide markets by territory is illegal *per se*. At bottom, petitioners seem to be quibbling with the Second Circuit's holding that they had "failed to show the allegedly relevant market to be a cognizable submarket" (Pet. App. 15a-17a; see Pet. 19). That fact-intensive issue, however, is plainly unworthy of review.

d. The core holding of the court of appeals here is, as the court emphasized, that an intrabrand no-switching agreement is not so manifestly anticompetitive that it should be kept outside the rule of reason and be held illegal *per se*. Petitioners' arguments in response, which total a single paragraph in the 26-page petition, as well as amici's response, are insubstantial.

Petitioners offer a passing, unexplained "see" citation (at 20) to *Big Apple BMW, Inc.* v. *BMW of North America, Inc.*, 974 F.2d 1358 (3d Cir. 1992), cert. denied, 507 U.S. 912

(1993). But that case actually supports respondent's (and the Second Circuit's) position and refutes petitioners'. The court in *Big Apple BMW* held that the alleged refusal to deal was to be assessed under the rule of reason, see *id.* at 1376, and stressed that "it is well settled that protecting interbrand, rather than intrabrand, competition should be the goal of antitrust law," *id.* at 1376 n.13. Both petitioners and amici cite *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966), which did concern intrabrand competition for GM cars, but it is doubtful that there is much left to the case even without a formal acknowledgment that it has been overruled: *General Motors* involved vertical restraints that the Court has since held subject to the rule of reason. *E.g.*, *Khan*, supra (holding that vertical maximum price fixing restraints are not illegal *per se*); *NYNEX* v. *Discon*, supra (holding that the *per se* rule does not bar a decision by one firm not to deal with a supplier). In any event, *General Motors* is distinguishable; even though it had horizontal aspects as well as vertical, the restraint in *General Motors* had the effect of price fixing (see 384 U.S. at 147-148), which is plainly not the case here. The same distinctions are true of *United States* v. *Topco Associates*, 405 U.S. 596 (1972), and *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967), cited by amici (at 6). Both those cases involved the allocation of geographic markets, and this one plainly does not.

2. The court of appeals properly dismissed in a footnote petitioners' alternative argument, that respondent's conduct should have been analyzed under the "quick look" rule of reason. Pet. App. 12a n.6. As this Court explained just last Term, "[t]he object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." *California Dental Ass'n* v. *FTC*, 119 S. Ct. 1604, 1618 (1999). Such an inquiry is precisely the one the Second Circuit undertook. It held that

the experience of the market was not so clear that the no-switching agreement would be always, or nearly always, anti-competitive; on the contrary, the alleged agreement had significant procompetitive aspects (efficiencies and savings by general agents in the training of subagents), which sufficed to justify the application of the full rule of reason. Pet. App. 12a n.6 (citing *NCAA*, 468 U.S. at 113 (reviewing the "proffered justifications" of procompetitive benefits of a horizontal restraint on output)).

As with their assertion that they can win under a *per se* rule a case that is concededly meritless under the full rule of reason, petitioners betray a fundamental failure to understand antitrust law. Petitioners assert that, if only the court of appeals would have engaged in *less*, rather than more, analysis, they could have won. It is the rule of reason that delves most deeply into the question whether an agreement is anticompetitive, yet petitioners concede that they cannot win under the rule of reason. Pet. App. 12a n.6. Instead, they come before this Court arguing that an agreement that cannot be condemned after thorough analysis is nevertheless so "*obviously*" anticompetitive as to justify condemnation under the "quick look" rule of reason, which applies to those agreements that are not quite familiar enough to be condemned *per se* but nevertheless can be seen to be anti-competitive "in the twinkling of an eye." *NCAA*, 468 U.S. at 109 n.39.

Petitioners' argument makes no sense. In rejecting that self-contradictory assertion, the court of appeals did just what this Court would subsequently confirm is the correct approach, and applied the "enquiry meet for the case," *California Dental*, 119 S. Ct. at 1618, that is, the standard, full rule of reason. In any event, what petitioners and amici are really complaining about is the Second Circuit's reference to respondents' "sound allegations of procompetitive benefit" (Pet. App. 12a n.6), which they say fell fatally short of a showing of "proof" (Pet. 24-25; Amici Br. 8-9). The court

of appeals' choice of word is irrelevant, however. The record is replete with evidence that the policy at issue has what the district court called "substantial procompetitive justification[s]" (Pet. App. 51a) and thus fosters interbrand competition — a point that petitioner Robert Bogan himself acknowledged during discovery (Pet. App. 51a n.19). Whether or not the evidence is sufficient or sufficiently probative is obviously not a matter that should concern this Court. Moreover, in insisting that respondent had a burden of "proof," petitioners betray a failure to understand how the quick look rule of reason works. What is necessary to take a case out of the quick look and into a full rule-of-reason analysis is merely "claim[ed] justification of the kind which a 'quick look' — usually at the arguments alone — shows to be legitimate in principle and capable of being proved satisfactorily." 7 AREEDA, *supra*, ¶ 1511, at 429; see also *United States* v. *Brown University*, 5 F.3d 658, 678 (3d Cir. 1993); *Chicago Professional Sports Ltd. Partnership* v. *National Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir. 1992). The court of appeals was entirely correct in saying that respondent had met *that* standard in spades.

3. This is, finally, a poor vehicle for resolving the questions presented, even were the petition otherwise certworthy.

a. Although the Second Circuit chose not to address the issue, there is substantial doubt as to whether petitioners could even prove a Sherman Act § 1 "conspiracy." See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984). Rather than being competitors with distinct economic interests, for the purposes of the alleged intrabrand no-switching agreement the NML general agents shared a "unity of interest" (*id.* at 771) in ensuring that their NML subagents were well trained through an efficient system. The general agents were thus incapable of the concerted activity barred by the Sherman Act. See, *e.g.*, *Oksanen* v. *Page Mem'l Hosp.*, 945 F.2d 696, 702-708 (4th

Cir. 1991) (en banc) (doctors who were independent contractors and often competed did not conspire with one another or a hospital to boycott another doctor because they shared an interest in accurate peer review), cert. denied, 502 U.S. 1074 (1992); see also *Card* v. *National Life Ins. Co.*, 603 F.2d 828, 831, 834 (10th Cir. 1979) (holding that the general agents of National Life Insurance "were really a part of the [company] structure" and so could not legally conspire with the company or each other).

b. There is also substantial doubt as to whether petitioners suffered antitrust injury and thus had standing to sue. The court of appeals suggested that they did not, though the court chose not to decide the issue in light of its disposition on the merits. See Pet. App. 16a n.7 (noting that "[petitioners'] submarket definition [of a submarket of NML subagents] is inconsistent with their claim to antitrust injury"; "any alleged conspiracy by General Agents to restrict intra-NML transfers would only *encourage* other insurers' entry into a hypothetically distinct market for experienced NML agents, increasing competition"). Given that petitioners likely did not have antitrust standing in the first place, petitioners still would have lost.

* * * * *

In the final analysis, this case is not like one in which a group of law firms in New York City agree not to lure away each other's associates, as petitioners would have it (Pet. 18). It is, rather, like a case in which certain associates working for a single law firm are assigned to a single partner, and the partners in the firm agree not to steal each other's associates to work for them. There can be no doubt that this type of agreement — though it may restrain the mobility within that single firm of that firm's associates — is an efficient way to train a firm's associates, and thus foster competition among law firms in general and ultimately provide consumers with more and better choices among different "brands" of law-

yers. A procompetitive agreement of that kind is surely not illegal *per se*.

Even if the legal profession worked slightly differently, and partners in law firms uniformly relied on independent contractors rather than associates to do their work, it is entirely obvious that agreements among the partners of a single firm not to poach on each other's contractors would lack the characteristics of a *per se* illegal agreement. Petitioners do not contend otherwise, but instead insist on analogizing this case to one involving *interbrand* competition. This case, however, involves only Northwestern Mutual Life agents, and thus petitioners' analogy fails, as the court of appeals correctly understood. The court's analysis was sound and wholly consistent with the decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

TIMOTHY P. COON
Bleakley Platt & Schmidt
1 North Lexington Avenue
P.O. Box 5056
White Plains, N.Y. 10602
(914) 949-2700

ROY T. ENGLERT, JR.
Counsel of Record
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

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IN THE

Supreme Court of the United States

ROBERT BOGAN and SCOTT BOGAN,

Petitioners,

—v.—

AUSTIN E. HODGKINS, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

John Doar
Michael S. Devorkin
Counsel of Record

Fran Obeid

DOAR DEVORKIN & RIECK
233 Broadway, 10th Floor
New York, New York 10279
(212) 619-3730

Attorneys for Petitioners

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MISCELLANEOUS

Areeda, Antitrust Law,
¶377a, p. 311 8

INTRODUCTION

Respondent and his horizontal conspirators agreed not to compete in price or any other way for petitioners' services in order to insure that their system "*is not torn apart by cutthroat competition for agent services*," H. Br. on Appeal, p. 41 n.15 (emph. added), and he used this anticompetitive agreement to threaten petitioners: "You can either work for me or get out of the business" (A784). To disguise that this is classic anticompetitive conduct at issue, respondent, like the Second Circuit, turns core antitrust principles on their head; seeks to overrule *United States v. General Motors Corp.*, 384 U.S. 127 (1966), and *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); and attempts to minimize the important conflicts with *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990), *per curiam rev'g* 874 F.2d 1417 (11th Cir. 1989), *on reh'g*, 893 F.2d 293 (11th Cir. 1990), and decisions of several circuits.

Respondent's misstatement of core antitrust doctrine demonstrates the importance and substantiality of the questions presented to public and private enforcement of the antitrust laws. This importance has been shown by the amici. We respectfully suggest that any doubt about this importance and the doctrinal conflict created by the opinion below may be removed by requesting the views of the United States.

STATEMENT

The court below agreed that on summary judgment it is necessary to accept petitioners' extensive proof of repeated written and oral statements by general agents and NML that the agreement not to compete was horizontal, made by and among the general agents, thus not an agreement created by NML. a5-6.[1] NML viewed its role only as an arbitrator.[2] a6. Respon-

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[1]Shortly before petitioners' terminations, NML wrote that this was an agreement "between the General Agents." A 1582.

dent's attempt to create a false factual issue does not deflect from the importance of the legal issue presented. Respondent also attempts to confuse the market to purchase agent services with the market to sell insurance. (at 8). While general agents can compete anywhere *to sell* insurance, they restrict themselves from competing anywhere in the restrained purchasing market at issue; that is, they cannot hire/compete within another agency to hire subagents.[3] *Chicago Pro. Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 674 (7th Cir.), *cert. denied*, 506 U.S. 954 (1992); *Sullivan v. NFL*, 34 F.3d 1091, 1103 (1st Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995).

I. THE PER SE STANDARD

No matter how hard respondent strains to avoid it, and the court below never honestly addressed it, this is a classic account splitting case, which has the same purpose and effect as bid-rigging. Rather than fix the price, the competitors refuse to bid at all, leaving one to claim the account. Competitors who split accounts are routinely criminally prosecuted by the United States. It is irrelevant that all bidders do not conspire, or that the victim has other choices or cannot prove an effect on price or competition and thus would lose if the full blown rule of reason rather than the *per se* standard were to apply.

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[2]The court below did not say, as respondent claims (at 1), that it would treat the agreement as horizontal "only because" it did not matter, but rather because the district court's contrary conclusion on summary judgment "was error." a10.

[3]Respondent refers to petitioners filing a new case. (at 3). After the antitrust claims were dismissed, the state law claims were dismissed without prejudice on jurisdictional grounds. Petitioners were required to file a new complaint to prevent the statute of limitations running before this petition is decided.

This case involves basic principles which this Court and the circuits have repeatedly upheld as to *horizontal* conduct by competitors: (1) agreements to split accounts even without geographic divisions or where the supplier has other options are *per se* illegal; (2) intrabrand competition does not save conduct from the *per se* standard. The reasons advanced for radically overturning these accepted principles are without merit.

1. Respondent argues that because there are few cases of agreements prohibiting independent contractors from switching, applying the *per se* standard would add a new category of conduct to those deemed illegal *per se*.[4] This rote response to an invocation of the *per se* standard is without merit. This Court's vast experience with the usually pernicious effect of account or supplier allocation conspiracies has been sufficient to conclude that the *per se* rule should apply even where there will be or can be no proof in a particular allocation case of any effect on the market price.[5] Each time a new type of horizontal allocation or a new industry presents itself, it is unnecessary for the

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[4]These restraints are not alien to this Court, which long ago struck down an employers' agreement not to compete for labor except on terms to which the employers alone agreed. *Anderson v. Shipowners' Ass'n*, 272 U.S. 359 (1926).

[5]Respondent's various assertions that petitioners are ineligible for the *per se* standard because they acknowledge they cannot prevail under a full blown rule of reason is a red herring that contradicts accepted antitrust doctrine. The purpose of the *per se* standard is to dispense with proof of market power or anticompetitive effect or intent. Petitioners have only acknowledged, as is true in most *per se* cases, that they cannot mount the expensive, difficult economic proof otherwise required.

Court to reinvent the wheel to determine whether the *per se* rule applies or to create a "new category."[6]

The simple issue is whether respondent's conspiracy was a supplier allocation. Respondent ignores this in the same facile way the court below did and just asserts this is not a supplier allocation. Such *ipse dixit* declarations cannot change the economic facts. It was undisputed that each general agent was a horizontal competitor for hiring subagents, and each agreed not to compete in price or otherwise for the subagents at another's agency. By definition, this is *account allocation* of supplies, not sales. Each subagent was allocated to the general agent currently using him. Every allocation conspiracy employs some method to allocate accounts. That the conspiracy allocates based on old versus new agents, zip codes, addresses, or last names does not make it a "new category."[7]

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[6]"[T]he argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for the *per se* rules," which is to avoid complicated economic investigation into whether a particular restraint in a specific industry is unreasonable. *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 351 (1982); *N.C.A.A. v. Bd. of Regents*, 468 U.S. 85, 100 and n. 21 (1984).

[7]Respondent cites 3 no-switching agent cases to support the rule of reason. *Union Circulation Co. v. FTC*, 241 F.2d 652 (2d Cir. 1957), was decided before *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), and *United States v. Topco Associates, Inc., supra*, held the *per se* rule applies to concerted refusals to deal. *Union* merely affirmed the F.T.C., which had used the rule of reason; the *per se* rule was not litigated. *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332 (7th Cir. 1967), was decided before *Topco*, relied on *Union*, and did not discuss Section 1, refusal to deal cases, or the *per se* rule. It reversed summary judgment obtained on theories not

2. Respondent argues that general agents can still compete with one another in any market they choose (not true of purchase markets) or agents can still transfer to some extent. (at 5-6, 8). That conspirators still compete in some ways or that victims have some alternative has never excused an agreement not to compete. *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 575 (2d Cir. 1961)(old customers versus new customers). In *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), an agreement not to compete in advertising was illegal *per se* even though competition in all other areas remained.

3. Respondent contends that an allocation of accounts is not illegal *per se* without a division of geographic markets. (at 8). This Court, at the Solicitor General's urging, rejected a similar radical attempt when it summarily reversed in *Palmer*. The Court reaffirmed that splitting a market is *per se* illegal without showing that a particular geographic market is divided among actual competitors. The circuit courts have repeatedly upheld civil and criminal judgments for dividing accounts without respect to any particular markets. *See* cases cited at Pet. Mem. 16.

4. Respondent contends that since general agents all market NML products, this is an intrabrand case, and normal *per se* rules do not apply.[8] While intrabrand cooperation to advance

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pertinent here and declined to address further issues as premature until further facts were developed. Respondent misstates *Consultants & Designers, Inc. v. Butler Serv. Group, Inc.*, 720 F.2d 1553, 1560 (11th Cir. 1983). It did not involve an agreement between two competitors, but rather a competitor trying to prevent an employer from enforcing a restrictive covenant against an employee and a hiring agency.

[8]In fact, although agents must give NML the right of first refusal, once they do, they are free to and actually do market the products of other carriers.

interbrand competition is relevant in a vertical case, it has never been a defense where horizontal competitors agree not to compete. *General Motors* involved purely intrabrand competition among Chevrolet dealers. In *Topco*, the district court had refused to apply the *per se* rule on the very ground urged here by respondent: eliminating intrabrand competition in Topco products would promote interbrand competition with national brand supermarket chains. *United States v. Topco*, 319 F.Supp. 1031, 1038 (N.D. Ill. 1970). This Court rejected the rule of reason because the intrabrand competitors were acting horizontally at the same market level. 405 U.S. at 608. *Accord, United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

Respondent argues that *General Motors* and *Topco* have been overruled, that *General Motors* was a price-fixing case, and that *Topco* depended on geographic markets. (at 9). It cites no authority for these propositions, which are patently without merit. That respondent must resort to such extreme arguments demonstrates how the opinion below conflicts with this Court's decisions and the importance to antitrust enforcement of granting the petition or summarily reversing.

General Motors has not been overruled, did not turn on a vertical restraint, and did not involve price-fixing in any sense more than is involved here. This Court continues to cite *General Motors* for the proposition that the *per se* standard applies in cases of horizontal agreements among competitors. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 734 and n.5 (1988); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 290 (1985). *General Motors* has been often and recently cited with approval for the proposition that a manufacturer's attempts to (i) induce horizontal competitors to act or (ii) help them enforce their agreements do not transform a horizontal agreement into a vertical one and make the *per se* standard inapplicable. *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 462 (3rd Cir. 1998);

Denny's Marina, Inc. v. Renfro Productions, Inc., 8 F.3d 1217, 1220 (7th Cir. 1993); *ES Development Inc. v. RWM Enterprises, Inc.*, 939 F.2d 547, 550 (8th Cir. 1991), *cert. denied*, 502 U.S. 1097 (1992).

Nor can *General Motors* be dismissed as a price-fixing case. While a purpose of the agreement was to eliminate sales by discounters and thereby reduce price competition from these discounters, this is no different than respondent's purpose here to eliminate "cutthroat competition." This is the obvious and presumed effect of any agreement to refuse to bid for the services or products of any suppliers. Fewer bids eliminates competition for supplies and puts the supplier at the mercy of the anointed conspirator as to price and otherwise.

Nor does *Topco* depend on geographic markets. Many cases in various circuits, cited by the amici or petitioners but ignored by respondent, apply the *per se* rule, reject respondent's reading of *Topco*, and demonstrate that this case creates a sharp split in the circuits. *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991), is identical to petitioners' case. It involved *no geographical division*, but competitors were convicted for agreeing not to bid on each other's accounts for one year after termination, although continuing to compete otherwise. *Accord, Hammes v. AAMCO Transmission, Inc.*, 33 F.3d 774, 782-83 (7th Cir. 1994)(no geographic division; intrabrand conspiracy among franchisees); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990)(no geographic division); *United States v. Cooperative Theatres*, 845 F.2d 1367, 1773 (6th Cir. 1988)(no geographic division; competition for new customers continues); *Service Merchandise Co. v. Boyd Corp.*, 722 F.2d 945, 950 (1st Cir. 1983)(intrabrand competition).[9]

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[9]Respondent's procedural arguments about this case (at 11-12), are also without merit. The general agents are fierce competitors, and NML emphasizes their independence. The

II. THE QUICK LOOK STANDARD

Since this was a naked restraint on competition to purchase a supply of agent services, the court below should at least have carefully scrutinized the likely impact of allowing such a restraint versus the proferred justification. Instead, it allowed a mere hypothesis of benefit to substitute for actual proof and to impose on petitioners a full blown rule of reason analysis. The district court only looked at this matter "in passing." a56. Respondent repeats the unsubstantiated post-hoc rationalization that the restraint encourages general agents to better train subagents. a51. There was no evidence that *respondent* paid a single penny to train Bogan or Bogan's subagents or that the restraint had any causal effect upon such training.

The only benefit for which Hodgkins is arguing is the desire of a monopsonist to be free from competition which lowers profits by increasing costs. If the quick look rule is to continue to have vitality and not just be a meaningless theoretical exercise, it must require more than spinning economic theory without any facts and without testing facts against reality.[10]

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district court found they could conspire and that the Bogans suffered injury, a37-38, a54 and n. 22. The leading commentator and the cases have held employees and service providers may challenge such antitrust violations. *Areeda, Antitrust Law*, ¶377a, p. 311; *Anderson v. Shipowners' Ass'n, supra*; *Dailey v. Quality School Plan*, 380 F.2d 484 (5th Cir. 1967); *Roseland v. Phister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942); *see Roman v. Cessna Aircraft Co.*, 55 F.3d 542 (10th Cir. 1995).

[10]There is nothing inherent in the general agents's relationship which requires cooperation in recruiting agents or maintaining a competitive balance, and even such necessary cooperation was not enough to sustain the restraint in *N.C.A.A., supra.* Nor are there ethical issues as in professional asso-

Although the general agents' agreement is an explicit refusal to bid for services and an agreement to divide suppliers, respondent does not reconcile the holding below with *California Dental Assoc. v. F.T.C.*, _ U.S. _, 119 S.Ct. 1604 (1999), other decisions of this Court, and the conflict with other circuits cited at Pet. Mem. 21. If allowed to stand, the opinion below will emasculate the abbreviated analysis. A full rule of reason analysis will always be imposed instead of an abbreviated balancing of the immediate procompetitive benefits and the anticompetitive evils and a determination of whether there are less restrictive means for achieving the benefits. *Chicago Pro. Sports Ltd. Partnership v. NBA*, *supra*, 961 F.2d at 674; *see Sullivan v. NFL*, *supra*, 34 F.3d at 1103.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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Respectfully submitted,

John Doar
Michael S. Devorkin
Counsel of Record
Fran Obeid
Doar Devorkin & Rieck
233 Broadway, 10th Floor
New York, New York 10279
(212) 619-3730
Attorneys for Petitioners

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ciation cases. Even those do not always justify the restraint. *Arizona v. Maricopa County Medical Soc.*, *supra*.